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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THOMAS L. SCHARFFE, D.P.M.,
Petitioner,

-v-

BETTY L. PERKINS and HARRY A. PERKINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEPHEN R. BERNSTEIN
(P10747)
30301 Northwestern Highway
Suite 300
Farmington Hills, MI 48018
(313) 851-8888
Counsel of Record

STEPHEN LINDEN (P16696)
30301 Northwestern Highway
Suite 300
Farmington Hills, MI 48018
(313) 851-8888
Counsel For Petitioner

HOWARD E. GURWIN
(P25179)
30301 Northwestern Hwy.
Suite 300
Farmington Hills, MI 48018
(313) 851-8888
Counsel for Petitioner

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

QUESTIONS PRESENTED

1. DOES A FINDING OF RECKLESS DISREGARD IN A MEDICAL MALPRACTICE ACTION RENDER SUCH CLAIM NONDISCHARGEABLE IN BANKRUPTCY UNDER THE PROVISIONS OF 11 U.S.C. 523(a)(6)?

2. MAY A FEDERAL COURT OF APPEALS REVERSE A FINDING OF NONDISCHARGEABILITY UNDER THE PROVISIONS OF 11 U.S.C. 523(a)(6) UNLESS THOSE FINDINGS ARE CLEARLY ERRONEOUS?

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LIST OF PARTIES

The parties to the proceedings below were the Petitioner THOMAS L. SCHARFFE, D.P.M. and Respondents BETTY L. PERKINS and HARRY A. PERKINS.

The Respondents before this Court are BETTY L. PERKINS and HARRY A. PERKINS.

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3 Collier on Bankruptcy, 15th Ed, 523-118-119, (1986) 5, 7

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-v-

BETTY L. PERKINS and HARRY A. PERKINS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner THOMAS L. SCHARFFE, D.P.M. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceeding on May 5, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported and is reprinted in the appendix hereto, p.1a, infra.

The opinion of the United States District Court for the Eastern District of Michigan Southern Division (Judge Horace C. Gilmore) has not been reported. It is reprinted in the appendix hereto p.16a, infra.

The memorandum, opinion and order of the United States Bankruptcy Court for the Eastern District of Michigan Southern Division (Judge Stanley B. Bernstein) has not been reported. It is reprinted in the appendix hereto, p.7a, infra.

JURISDICTION

Federal Jurisdiction was invoked when Petitioner filed a petition for bankruptcy protection pursuant to Title 11 of the United States Code, §101 et sequential. Respondent BETTY PERKINS and HARRY A. PERKINS filed an adversary pro-

ceeding pursuant to the Bankruptcy Code to have the indebtedness of Petitioner determined nondischargeable in bankruptcy pursuant to 11 U.S.C. 523(a)(6). The Bankruptcy Judge Stanley B. Bernstein found the debt to be dischargeable and entered the memorandum, opinion and order on August 3, 1984. See p. 31.

On respondents appeal, Judge Gilmore on August 25, 1985, in his opinion from the bench, as set out at p. 39 entered a judgment and opinion affirming the Bankruptcy Court's determination that the debt was dischargeable. Respondent then appealed to the United States Court of Appeals for the Sixth Circuit and the Court, in an opinion decided and filed May 5, 1987, reversed the decision of the District Court. See p. 25. No petition for rehearing was sought.

The jurisdiction of the Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §2101.

STATUTE INVOLVED

11 U.S.C. 523(a)(6).

A discharge in bankruptcy does not discharge an individual debtor from any debt — (6) for willful and malicious injury by the Debtor.

STATEMENT OF THE CASE

Petitioner has been a practicing podiatrist in rural upstate Michigan for 17 years. In 1983, he instituted a voluntary petition for bankruptcy pursuant to 11 U.S.C. 101 et seq. Among the debts, the bankruptcy petition sought discharged was that of BETTY and HARRY PERKINS, Respondents herein, who had in 1981 filed a medical malpractice complaint in the State Court, that being Bay County Circuit Court. Subsequent to the filing of the bankruptcy, a consent judgment was entered into in the Bay County Circuit Court fixing the amount of damages at a sum certain and left the issue as to whether or not the debt was dischargeable in bankruptcy for the Bankruptcy Court.

Respondents then filed an adversary proceeding in the pending bankruptcy proceeding to have the matter heard by the Bankruptcy Court in a decision as to the dischargeability issue.

At a trial of the matter, which was held on May 4, 1984 and June 28, 1984, the Bankruptcy Court Judge Stanley B. Bernstein found in favor of Petitioner and entered the memorandum, opinion and order determining the debt to be dischargeable pursuant to the Bankruptcy Code.

Respondents PERKINS then appealed the opinion and order of the Bankruptcy Court Judge to the United States District Court for the Eastern District of Michigan Southern Division.

On August 25, 1985, Federal District Judge Horace Gilmore upheld the Bankruptcy Court's decision affirming that decision as being a correct interpretation of 11 U.S.C. 523(a)(6).

Respondents then appealed to the United States Court of Appeals for the Sixth Circuit. However, DR. SCHARFFE, due to serious financial problems was unable at that time to retain counsel to properly respond to the arguments made on appeal.

In its appeal brief, Respondents made numerous erroneous statements of both the facts and the law which will be pointed out at length should the Court elect to grant Petitioner's request for Writ Of Certiorari.

At the Circuit Court of Appeals level, the Respondents asked the Sixth Circuit Court to overrule what was clearly a factual decision by the Bankruptcy Court.

The central issue that is presented at all levels in this proceeding is and has been whether or not medical/podiatric treatment such as that rendered by Petitioner to Respondent BETTY PERKINS is dischargeable in bankruptcy pursuant to 11 U.S.C 523 (a)(6).

Respondents were given the opportunity in the proceedings before Judge Bernstein to prove that the indebtedness to the Debtor by DR. SCHARFFE was of the nature so as to be nondischargeable under the Bankruptcy Code.

Judge Bernstein heard all the testimony, listened to all the witnesses and reviewed all the exhibits. In his memorandum opinion he held:

> "The record in this proceeding supports the finding the Debtor caused the infection by injecting an unsterile needle into the deep tissue of MRS. PERKINS' foot and that his treatment of that infection did not meet the appropriate standard of care. He failed to test the infected area in a timely manner; he failed to prescribe the drugs of choice required by the laboratory analysis; and he failed to hospitalize the Plaintiff. From further laboratory analysis showed that only hospital strength antibiotics administered intravenously could combat the virulent infections. This Court therefore finds that the Plaintiff's injuries were caused by the Debtor and that under the tort law of this State, they are entitled to damages."
>
> "No evidence was, however admitted, to support the finding that the Debtor intended to harm MRS. PERKINS. Proof that the Debtor injected an unsterile syringe and prescribed the inaffective medications does not prove wilful and malicious injury. It was not the intent to inject the syringe or prescribe the medications as satisfied this statute. It was the intent to cause harm that has to be proven.
>
> Although this Court may regard the Debtor's treatment of this Plaintiff to be absolutely appalling, that conduct did not rise to a level of an intentional tort contemplated in 523(a)(6)."

Petitioner throughout these pleadings will emphasize the fact over and over again that Judge Bernstein's well reasoned opinion should be controlling.

As Judge Bernstein's stated in summing up his opinion:

> "The Bankruptcy Code makes no special provision for the nondischargeability for damages caused by negligence. That policy may be ill advised but as the law, it presently stands." See *Foell v Hungate.* (In RE Hungate, 2 Bankruptcy Report, CT Dec. 1046) (Bankruptcy E.D. Mich 1965). Consent Judgment entered into between these Plaintiffs and the Debtor is determined to be dischargeable."

The Court of Appeals, in its decision, reversed Judge Bernstein and Judge Gilmore in holding:

> "We find the facts in the case before us are very similar to the facts before the Court in *Franklin* and we therefore reach the same conclusion as did the Court in that case."
>
> "Our opinion is reinforced by the latest bankruptcy treatise which states:
>
> > 'In order to fall within the section of 523(a)(6) the injury to an entity or property must have been wilful and malicious. An injury to an entity or property may be a malicious injury within its provision if it is wrongful without just cause or excessive even in the absence of personal hatreds, spite or ill will. The word wilful means deliberate or intentional. A deliberate or intentional act which necessarily leads to injury. Therefore, a lawful act unintentionally which necessarily produces harm without just cause or excuse may constitute a wilful and malicious injury." 3 Collier on Bankruptcy 523-111 (15th Edition, 1986).'
>
> For the reasons given above, decision of the District Court is reversed."

However, the Court of Appeals in its infinite wisdom nowhere states what facts it relies upon for its holding. A bold conclusion is stated without the logical steps on how that conclusion was reached. In addition, as earlier mentioned, there was no response on appeal by Petitioner, DR. SCHARFFE.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's nondischargeability doctrine denies the protection of the bankruptcy act for debts which Congress has intended to be dischargeable and conflicts with decisions of this Court and other Circuits as well as the Lower Court.

The Sixth Circuit has decided to dispose of the clear and unambiguous intent of the Congress of the United States when it codified the Bankruptcy Act in its present form as the Bankruptcy Reform Act of 1978.

The issue in its most simplified form before the Court is whether or not the facts herein are sufficient within the statutory language so as to have the debt declared nondischargeable and judgment issued thereon. See 11 U.S.C. 523(a)(6). The current statute was previously codified in the Bankruptcy Act of 1898 as amended under Section 17(a)(2) which read in its pertinent part:

> "A discharge from bankruptcy shall release from bankrupt of all the approvable debts such as are (2) for wilful and malicious conversion of the property of another." 11 U.S.C. §35(a)(2).

As the Court stated in *In RE Hodges*, 4 BR 513 (1980), there was a change when the bankruptcy law was enacted in 1978 pursuant to the Bankruptcy Reform Act of that year. As the Court stated in that case:

> "It had become well settled by case law, part of the enactment of the Bankrutpcy Reform Act of 1978 that the proper construction to be placed on the parellel provision of the Bankruptcy Reform Acts §523(a)(6) - §17(a)(2) of the Act was the standard of 'reckless disregard'." See *Tinker v Colwell*, 193 U.S. 473, 24 S Ct 505, 48 L.ED., 754 (1904).
>
> "It was clear that an injury to an entity or property could have been malicious if it was wrongful and with-

> out just cause or excessive even absent personal hatred, spite or ill will." See *Tinker,* supra.

Where the Court said:

> "In order to come within the meaning as a judgment for wilful and malicious injury to personal property, it is not necessary that the cause of action be based on special malice so that without it the action could not be maintained."

The Court in *Hodges* went on to state that the *Tinker* standard of knowing disregard became settled law. However:

> "The House and Senate reports involving Legislative discussion of the implementation of the new Bankruptcy Code, the knowing disregard standard was expressly overruled. H.R. Rep. #595, 95th Congress, First Session, 363 (1977), S Rep. #989, 95 Congress, First Sess. 77-79 (1978), U.S. Code Cong. And Admin. News 1978, p.5787. (To the extent that *Tinker v Colwell,* 193 U.S. 473, 24 S Ct 505, 48 L.ED., 754 (1904) held that a looser standard is intended and to that extent the other cases have relied on *Tinker* to apply a reckless disregard standard, they are overruled. 3 Bankruptcy L.ED. §22:35 citing Legislative history §82:17, *Collier* notes the same fact that the reckless disregard standards in the cases that uphold the standard and constraint §17(a)(2) of the Bankruptcy Act are not applicable in interpreting §523(a)(6). 3 *Collier* 523.16(3) (15th Edition, 1979)." At p. 515.

The Sixth Circuit in this instant matter has seen fit to completely disregard the Legislative history and clear Legislative intent to overrule the *Tinker v Colwell* holding and to allow discharge of any debts unless those were proven to be wilful and malicious and wilful and malicious must be read in the conjunctive. See *In RE Hodges,* supra.

What the Sixth Circuit Court of Appeals has done is to simply disregard the clear intent of Congress as expressed in the Legislative history of the Bankruptcy Reform Act of 1978. As stated in other decisions interpreting the dischargeability issue as *In RE Adams*, 761 F2d 1422 (1985), other U.S. Courts of Appeals have recognized that some weight must be given to the Legislative history. See *May Department Stores Co. v Smith*, 572 F2d 1275, 1278 8th Cir (per curiam cert. denied 439 U.S. 837, 99 S CT 122, 58 L.ED 2nd 134 (1978). Quoting from p. 1426 of the *Adams* decision:

> "A subsequent amendment and its Legislative history, though not controlling is nonetheless entitled to substantial weight in construing the earlier law."

The Court of Appeals in the instant matter simply relied on the similarity between *In RE Franklin*, 615 F2d 609 10th Cir (1980). Finding the facts in the case before us that being *PERKINS v SCHARFFE* are very similar to the facts before the Court in *Franklin*. However, there was no discussion as to what facts in *PERKINS v SCHARFFE* were similar to the facts in *Franklin*.

It is Petitioner's contention that not only the Sixth Circuit misinterpreted Congress' clear intent but also has misinterpreted *In RE Franklin* and other decisions which Petitioner believes support the interpretation of 523(a)(6) as expressed herein.

Clearly *In RE Franklin* can be distinguished from the present situation. First and foremost, the judgment in *Franklin* was partially for punitive damages which are normally awarded for malicious or wanton conduct. In addition, the Court in *Franklin* simply deferred to the decision of the Bankruptcy Court which is directly contradictory to the holding of the Sixth Circuit in this matter.

The Court in *In RE Franklin* at p. 609:

> "The Bankruptcy Court as an independent trier of fact made its own determination, leaving the Court its op-

> portunity to review the termination only if it is found to be clearly erroneous and unsupportive by the evidence."

The Court went on to state:

> "That decision (referring to the Bankruptcy Court's final decision) upheld by the District Court is supportive by substantial evidence in the record and not clearly erroneous it must be affirmed."

Clearly the Court of Appeals in *In RE Franklin* in affirming the Bankruptcy Court's decision relied on the Bankruptcy Court as the finder of fact. However, in the present matter, the Sixth Circuit Court of Appeals would replace the Bankruptcy Court as the finder of fact.

Also in support of Petitioner's contention and contrary to the Sixth Circuit Court of Appeals decision in this matter is *In RE Dardar*, 620 F2d 39 (1980) which also arose under the old act. However, certainly its reasoning is applicable herein wherein the Court stated:

> "The initial determination which must be made is whether the beating by *Dardar* was wrongful or that it was justified because of petty prior acts."

Thus the Court in *Dardar* is making a two prong decision making process expressing the same logic as Judge Bernstein in his decision.

The first step in the determination must be whether the Debtor's actions were wrongful and the second step is whether those wrongful acts are clearly intentional acts which would necessarily lead to injury and without excuse or cause.

Clearly in a case of medical malpractice, the acts of malpractice must go beyond ordinary negligence and must be of such a nature that not only are the acts wrongful but they were clearly intended to lead to injury. There is no evidence to support this contention in this matter. Rather, the evidence as heard by Judge Bernstein supports only one conclusion and that is although DR. SCHARFFE'S actions might have been wrongful, they were

clearly not intended to injure Respondent and that DR. SCHARFFE proceeded on the course of action as he did with the intent of trying to help rather than harm Respondent.

That there is conflict between the Circuits is evident in such other decisions as *In RE Adams*, 761 F2d 1422 (1985), wherein the Court expressed the opinion that the amendment to the Bankruptcy Act contained in §523(a)(9) which made debts resulting from driving while intoxicated nondischargeable was clear and explicit and intended to clarify conflicting bankruptcy decisions under 523(a)(6). The Court went on to recognize that clear congressional intent must be given its effect and therefore no evidence that the judgment Debtor intended to injure anyone was necessary when drunk driving was involved. No such amendment to the statute has been added in the case of medical malpractice when Congress amended the Bankruptcy Code in 1984 and added the provisions of 523(a)(9).

Petitioner would also submit that *In RE Quezada*, 718 F2d 121 (1983) is a U.S. Court of Appeals case arising out of the 5th Circuit that is directly contrary to the Court of Appeals holding herein. In *Quezada*, the Court of Appeals found that a debt arising from the tortious conduct of the debtor to wit: a judgment for damages arising out of injuries inflicted by a pit bull dog owned by the Quezadas and which dog had previously bitten a child. The Circuit ruled that:

> "In 1978 §523(a)(6), Congress expressly intended to overrule Legislatively the reckless disregard test for nondischargeability." See p. 122.

The Court in *Quezada* went on to affirm the decision of the Bankruptcy Court for dischargeability as not being within the exception of "willful and malicious injury by the debtor within the meaning of §523(a)(6).

In addition, there is clearly a split of authority amongst the various District Courts and the Bankruptcy Court regarding the nondischargeability issue under 11 U.S.C. 523(A)(6).

Judge Bernstein. in fact, in his decision, relied on a trend of case such as *In RE Ceccini*, 786 F2D 140, 9TH CIR (1986) as clear precedent for a requirement that there must be a factual showing that the actions of the Debtor were intended to harm the victim.

Another case which is almost identical factually to the instant matter is *In RE Tanner*, 31 Bankruptcy Reporter, 338 (Bankruptcy Florida 1983) wherein the Court held that the exception to dischargeability are to be narrowly and strictly construed in favor of the Debtor and that there must be a clear and convincing showing of the intent to harm the Creditor for proving nondischargeability of the debt. In addition, the act must be wrongful and without just cause or clearly excessive. Here DR. SCHARFFE'S acts, no matter what, were intended to help and not harm Respondent. According to *In RE Tanner* at p. 339:

> "In order for this Court to find the judgment debt to be nondischargeable, the Plaintiff must prove by clear and convincing evidence that the Debtor performed surgery upon the foot of the Plaintiff Morales with intent to injure Mr. Morales. That the surgery was intended when performed without just cause or excuse and that he knew he would injure Mr. Morales and performed the surgery in the face of that knowledge."

The Court in *In RE Tanner* went on to state at length:

> "Based upon all the evidence presented and resolving all conflicts and connection, the Court finds that the Plaintiffs have failed to sustain the burden of proof and fail to prove by clear and convincing evidence that the Debtor's specific wilful and malicious intent to injure Mr. Morales during surgery. The Court is constrained to apply the laws in accordance with congressional intent. It is not the province of this Court to legislate. Accordingly, the Court must find that the judgment is not a debt for wilful and malicious injuries contemplated by

> the Bankruptcy Code §523(a)(6) and that such is dischargeable."

The Court, it if examines the facts of *In RE Tanner*, will note that it concerned podiatry treatment negligently performed, and that result is directly contrary to the decision for which review is now sought.

The distinction between *In RE Franklin* and the present matter is that the State Court judgment of intentional misconduct was found to be res judicata. Here, there is no State Court decision which would be res judicata on the parties. The Sixth Circuit Court in *SCHARFFE* further ignores that *In RE Franklin* was decided under statute preceding the present Bankruptcy Act. In addition the facts in *In RE Franklin* presented extraordinary circumstances. Not only was the malpractice blatant and the injuries catastrophic but the record revealed that the doctor intentionally destroyed records to cover up his errors. Those extremes in combination with the standard of nondischargeability under the then existing act lead to the Court's determination.

It is also Petitioner's position that this Court must review and give guidance on a question which affects possibly hundreds, maybe thousands of actual or potential applicants of the protection of the Bankruptcy Court. No clear guidance has been given on this question since the *Tinker v Colwell* decision of 1904, which this Court would do well to remember was the case involving criminal conversation which the Supreme Court of that era determined was nondischargeable and set a whole precedent for nondischargeability cases, none of which have been re-examined by this Court in light of the Bankruptcy Reform Act of 1978. The language in the Act is clear and unambiguous. Quoting once again from Legislative history:

> "Except that for wilful and malicious injury by the Debtor to another person of the property of another person within this paragraph . . . to the extent that other cases have relied on *Tinker* to express a reckless disregard standard, they are overruled."

All acts by their nature require some requisite degree of an intent even though often times the result is not what the intent had been. Here, DR. SCHARFFE certainly intended the acts that he did but he never intended any harm to come to MRS. PERKINS, instead, quite the contrary, intended to help her and treat her. Clearly this distinguishes the present situation from the situation such as *In the Matter of Klix,* 23 BR 187 (1987) and *In the Matter of Wooten,* (Bank Ct N.D. Alabama, 1983) where the debtor proceeded deliberately and intentionally in the face of knowledge intending the consequences of the act knowing it would harm the creditor. DR. SCHARFFE did not know that his treatments to MS. PERKINS were going to harm her and what the Court of Appeals has done is to allow an expert to replace the Judge as a trier of fact.

Inherent in this situation are possible violations of due process and equal protection of the law as guaranteed by the Constitution and Bill Of Rights. Clearly what we have in the present case is testimony by Respondents' expert who in this case was a crusader in the podiatric field who felt that anyone who violated accepted standards of treatment had to be punished and should not be allowed to escape that punishment through the relief of the Bankruptcy Courts. In this case, the expert was serving a sort of quasai judicial officer/jury/board of review in deciding that DR. SCHARFFE should have to pay a judgment pursuant to the expert's interpretation of the Bankruptcy Act. Clearly the door is left open in any medical malpractice case and numerous other tort situations involving ordinary negligence where a creditor/tort victim will hire an expert who can testify that the conduct of the debtor was so blatant in his acts of negligence that it would warrant that the debt must be determined to be nondischargeable.

Numerous times in their appeal brief, the PERKINS' lawyers contended that the Bankruptcy Court ignored the testimony of their expert Dr. Touchton who made numerous references to the acts of DR. SCHARFFE. See appellant brief, p.45. The logic

expressed in that brief is of an Alice In Wonderland type logic as expressed in their conclusion on p.48:

> "There is no requirments that the act specifically intend to harm a person."

What Respondents would impose is a standard of review for any negligent action where the Bankruptcy Court would review the decision of an expert such as Dr. Touchton and determine whether or not the expert was correct in deciding that the acts of the tort-feaser were so blatant as to be nondischargeable.

II.

The review of a Bankruptcy Court Trial Judge's decision by a Federal Court of Appeals wherein the Bankruptcy Court ruled that a debt was determined nondischargeable cannot subsequently be reversed by the Court of Appeals unless the Lower Court's decision is clearly erroneous.

The Court of Appeals in reversing the decision of not only Judge Bernstein, the Bankruptcy Judge, but also Judge Horace Gilmore, the District Court Judge who reviewed the matter, reviewed the record as submitted by Respondents on appeal. It must be remembered that Petitioner did not respond to any of the documents filed with the Court of Appeals.

The Court of Appeals as stated earlier herein, simply reversed relying on *In RE Franklin* as being a situation similar to the present case. However, nowhere in this decision does the Court of Appeals state what facts they found in the instant matter to be in line with the facts in *In RE Franklin* and Petitioner contends that the only decision *In RE Franklin* can support is a decision in his favor.

In Re Franklin as stated earlier was a case wherein the Court of Appeals simply relied on the earlier decision of the Bankruptcy Court Judge as being proper. *In RE Franklin,* can easily be distinguished from the present proceeding and Judge Bernstein focused on this in some detail in his opinion and order. Quoting from Judge Bernstein:

> "The debtor in *Franklin* was the surgeon who was held responsible for anesthesia given to a minor during an appendectomy. The plaintiff bank was the guardian of the minor's estate. The debtor failed to obtain any medical history as a part of surgery and over anesthetized the patient. The boy suffered cardiac arrest during surgery and was severely brain damaged as a result. Default judgment awarding compensatory damages was entered in State Court and a trial was held on the issue

> of punitive damages. Those damages were also awarded and affirmed on appeal.
>
> The primary issue presented in *In RE Franklin* involved the deference to be paid to State Court findings in proceedings, ie. whether a State Court judgment has res judicata or collateral effect. The discussion of wilful and malicious conduct under §17(a)(8), the act has very little applicability here because of the substantive changes reflected in the Legislative history of 523(a)(6) of the code. Those changes will be discussed below.
>
> The fact that *Franklin* presented extraordinary circumstances not only was the malpractice blatant and the injuries catastrophic but the record revealed that the doctor intentionally destroyed records to cover up his errors. Those extremes in combination with the looser standard for nondischargeability under the Act resulted in the Appellant Courts' affirmation of the Bankruptcy Court's finding of nondischargeability."

The question then becomes what is the standard for review by the Appellant Courts in a nondischargeability case. As the Court stated in *In RE Franklin* on p.609:

> "The Bankruptcy Court is an independent trier of fact and made its own determination leaving this Court the opportunity to review that determination only to be clearly erroneous and unsupported by the evidence."

And the Court went on at p.610 to state:

> "That decision (referring to the Bankruptcy Court's final decision) upheld by the District Court is supported by the substantial evidence in the record and not clearly erroneous and must be affirmed."

There was no showing at any level that Judge Bernstein's decision was clearly erroneous. As the Court stated in *In RE Tanner* at p.339:

> "In order for plaintiffs to prevail in their challenge to dischargeability of a debt, they must establish each element of the challenge by clear and convincing evidence ... In order to find the judgment debt to be nondischargeable, plaintiff must prove by clear and convincing evidence that either the debtor performed surgery on the feet of the plaintiff, Mr. Morales with the intent to deliberately injure Mr. Morales, that the surgery was intentionally performed without just cause or excuse or that the debtor knew he would injure Mr. Morales and perform that surgery in the face of that knowledge." See above cited cases.

> "Based upon all the evidence presented and resolving all conflicts in connection therewith, the Court finds that the plaintiffs have failed to sustain their burden of proof. They have failed to prove by clear and convincing evidence that the debtor had the specific wilful and malicious intent to injure Mr. Morales during surgery. The Court is constrained to apply the laws presently written and enacted in accordance with congressional intent. It is not the province of the Court to legislate. Accordingly, the Court must find that the judgment is not a debt for wilful and malicious injuries contemplated by the Bankruptcy Code §523(a)(6) and as such is dischargeable."

In *Coen v Zick*, 458 F2d 326 (1972), the 9th Circuit Court of Appeals succinctly stated the issue at p.328:

> "We may not set aside the findings of the referree which have been affirmed by the District Court unless those findings are clearly erroneous." *Monroe v Cussen*, 454 F2d 1151 (9th Cir 1972), Rule 52 (a) Federal Rules Of Civil Procedure.

Remembering also that *Coen* is a dischargeability case and therefore applicable to the present situation and the Court went on to state at p.328:

> "In the present case, the findings rest upon the written record of the proceedings of the Trial Court about which there is no question. Therefore, the only unresolved inquiries of whether that record taken is true constitutes sufficient proof to establish the judgment obtained by appellant against the bankruptcy and the State Court was based upon wilful and malicious acts of Coen.

The Bankruptcy Courts are governed by their own rules and the rule controlling this situation, which is Bankruptcy Rule 7052, refers back to Rule 52 of the Federal Rules Of Civil Procedure:

> "Rule 7052, Findings Of The Court, Rule 52 Federal Rules Of Civil Procedure applies in adversary proceedings.
>
> Rule 52. Findings of the Court.
>
> (a) Effect. In all the actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions

> of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." (Emphasis added)

Judge Bernstein's decision in this matter was a finding of fact given only after the Judge had an opportunity to hear all the testimony, all the arguments and after Judge Bernstein had the opportunity to judge the credibility of witnesses. As a matter of law, Judge Bernstein's decision must be given its proper controlling weight.

CONCLUSION

In conclusion, Petitioner asks that the Court review the issue of dischargeability for liabilities of the nature presented herein. As is apparent from the numerous Bankruptcy Court cases as well as District Court cases, in which this issue has arisen time and again and with the increase not only in the number of Bankruptcy Petitions but also in the number of professionals, not only podiatrists, but doctors, dentists and lawyers who have filed for protection of the Bankruptcy Act from liabilities incurred as a result of negligence or a malpractice claim. An answer to this question one day will be necessary.

Petitioner would point to what Judge Engle said in his concurring opinion of *PERKINS v SCHARFFE*:

> "Uniformity in this question is desirable because bankruptcy is an area in which 'it is more important that the applicable law be settled and it be settled right'." *Burnett v Coronado Oil & Gas Co.*, 285 US 393, 406 (1932) (Judge Brandies dissenting).

However, a reading of the context from which that quote is taken,

> "I agree with Mr. Justice Stone that the case was wrongfully decided and should now be frankly overruled. Merely to strictly construe this doctrine will not adequately protect the public revenues. Compare *Jaybird Min. Co. v Weir*, 271 U.S. 609, 70 L ED 1112, 46 S. Ct. 592.
>
> Stare decisis is not, like the rule of res judicata, a universal, inexorable command. 'The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' *Hertz v Woodman*, 218 US 205, 212, 54 L Ed 1001, 1005, 30 S Ct 621. Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled

> than that it be settled right. Compare *National Bank v Whitney*, 103 US 99, 102, 26 L Ed 443,444. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

Petitioner's major contention throughout this matter has been that the Legislature, that is Congress, has attempted to correct this error by the express overruling of *Tinker's* reckless disregard standard and this Court must give effect to this Congressional intent.

Respectfully submitted,

STEPHEN R. BERNSTEIN (P10747)
30301 Northwestern Highway
Suite 300
Farmington Hills, MI 48018
(313) 851-8888
Counsel of Record

STEPHEN LINDEN (P16696)
30301 Northwestern Highway
Suite 300
Farmington Hills, MI 48018
(313) 851-8888
Counsel For Petitioner

HOWARD E. GURWIN (P25179)
30301 Northwestern Highway
Suite 300
Farmington Hills, MI 48018
(313) 851-8888
Counsel for Petitioner

APPENDIX

Opinion and Judgment of Court of Appeals

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 85-1555

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BETTY L. PERKINS and HARRY A. PERKINS,
Plaintiffs-Appellants,
v.
THOMAS L. SCHARFFE,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 5, 1987

Before: ENGEL and JONES, Circuit Judges; and ALLEN, Senior District Judge.*

ALLEN, Senior District Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. ENGEL, Circuit Judge, (p. 6) delivered a separate concurring opinion.

PER CURIAM. This case arises as an appeal from a decision rendered by the United States District Court for the Eastern District of Michigan affirming an order of the United States Bankruptcy Court for that district.

---

*The Honorable Charles M. Allen, Senior District Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

Both the district Court and the bankruptcy court held that a judgment of $180,000.00, which the appellants had obtained against the appellee, was dischargeable in bankruptcy. Appellants contend that the judgment debt was nondischargeable under 11 U.S.C. § 523(a)(6)(1979). Section 523(a)(6) provides: A discharge under this title does not discharge an individual debtor from any debt "—for willful and malicious injury by the debtor to another entity or to the property of another entity."

This case had its genesis in the medical-podiatric treatment of appellant Betty L. Perkins by the appellee, Dr. Scharffe, which both the Bankruptcy and District Judges correctly characterized as being absolutely appalling. The proof showed that Dr. Scharffe unnecessarily injected Mrs. Perkins's left foot with an unsterile needle or contaminated medication. Thereafter, he failed to perform timely tests when resultant infection was apparent. Dr. Scharffe then ignored the results of belated tests that identified the offending bacteria and disclosed the appropriate drugs and drug strengths to combat them. Finally, Dr. Scharffe failed to hospitalize Mrs. Perkins when hospitalization was urgently needed.

Harry and Betty Perkins filed suit against Dr. Scharffe in the Bay County Court in Michigan. Dr. Scharffe filed a Chapter 7 petition with the bankruptcy court and after the automatic stay pursuant to 11 U.S.C. § 362 (1979) was removed, the Bay County action was concluded by a negotiated consent judgment of $180,000.00. That judgment specifically reserved the question of dischargeability for the bankruptcy court's consideration.

The resolution of this case depends upon the interpretation given to the terms "willful" and "malicious", which appear in § 523(a)(6). The committee notes to the statute provide that "willful" means deliberate or intentional. The bankruptcy courts that have decided this matter have been divided as to whether the statute requires an intentional act that results in injury or an act with intent to cause injury. Those

which follow the more lenient standard are: *In re DeRosa*, 20 Bankr. 307 (Bankr.S.D. N.Y. 1982); *In re Fussell*, 15 Bankr. 1016 (W.D. Va. 1981); *In re McGiboney*, 8 Bankr. 987 (Bankr.N.D. Ala. 1981). Those that follow the stricter standard are *In re Finnie*, 10 Bankr. 262 (Bankr.D.Mass., 1981); *In re Hinkle*, 9 Bankr. 283 (Bankr.D.Md. 1981); and *In re Graham*, 7 Bankr. 5 (Bankr.D.Nev. 1980).

The circuit courts, however, which have addressed this question have adopted the looser standard. *See In re Cecchini*, 780 F.2d 1440 (9th Cir. 1986); *In re Franklin*, 726 F.2d 606, 610 (10th Cir. 1984); *Matter of Quezada*, 718 F.2d 121, 123 (5th Cir. 1983); and *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983).

In re Franklin is particularly instructive as it involves facts somewhat similar to the facts in the case at bar. In that case, Paul Sanchez was admitted to the hospital for an appendectomy. The operation was performed by appellant who was an osteopathic surgeon. Cardiac arrest occurred during the surgery and Sanchez suffered extensive brain damage. 726 F.2d at 608.

Legal proceedings were initiated against Dr. Franklin alleging reckless and willful medical care and claiming compensatory and punitive damages. After a default judgment had been entered awarding both compensatory and punitive damages the state appellate court reversed the award of punitive damages and a trial was held on that issue and resulted in a general verdict awarding punitive damages to Paul Sanchez *Id.*

Both the bankruptcy court and the district court originally held that based upon the record and judgment in the state court, the debt owed was nondischargeable. The Tenth Circuit Court of Appeals reversed those rulings because of its opinion that the bankruptcy court in making a discharge determination was not limited to review of the state court judgment and record. *In re Franklin*, 615 F.2d 909 (10th Cir.

1980). The bankruptcy court on remand held that the appellant was liable for willful and malicious injury to the person of another and that the debt was not dischargeable. On direct appeal from the Bankruptcy Court, the appellate court affirmed the decision of the bankruptcy court. The Court of Appeals after citing § 523 noted that no definition is given in the statute for the terms "willful" and "malicious." The court went on to state that the notes of the committee, as well as case law, has provided the meaning of those words, and that the notes state that "willful" means "deliberate or intentional." The court then observed that other courts have generally held that "willful" and "malicious" requires the intentional doing of an act that necessarily leads to injury. It also observed that this definition was accepted in *Den Haerynck v. Thompson*, 228 F.2d 72 (10th Cir. 1955). *Id.* at 610.

The court in *Franklin* found that there was sufficient evidence to support the finding of the bankruptcy court that the actions of the appellant amounted to a willful disregard of his duty and a complete and total disregard of acceptable medical practice and, therefore, constituted willful and malicious conduct. The court noted that there was a finding that the appellant prescribed an anesthetic without a patient history, overinduced the patient with anesthesia, and covered up two records pertaining to the surgery and subsequent cardiac arrest. *Id.*

We find that the facts in the case before us are very similar to the facts before the court in *Franklin* and we therefore reach the same conclusion as did the court in that case. Our opinion is reinforced by the leading bankruptcy treatise, which states:

> In order to fall within the exception of section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just

> cause or excessive, even in the absence of personal hatred, spite, or ill-will. The word "willful" means "deliberate or intententional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

3 COLLIER ON BANKRUPTCY 523-111 (15th ed. 1986).

For the reasons given above, the decision of the District Court is reversed.

ENGEL, Circuit Judge, concurring. I concur because I agree that the result reached by the majority is largely consistent with the position taken by the circuits which have addressed this same question, see particularly *Wheeler v. Laudani*, 783 F.2d 610 (6th Cir. 1986); *In re Franklin*, 726 F.2d 606 (10th Cir. 1984); *In re Cecchini*, 780 F.2d 1440 (9th Cir. 1985). Uniformity on this question is desirable because bankruptcy is an area in which "it is more important that the applicable law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Were we writing upon an entirely clean slate, however, I would have been inclined to agree with United States District Judge Horace C. Gilmore's conclusion of dischargeability. The conduct which occasioned the judgment against the bankrupt doctor, while agreed by all to be "appalling" was not "willful and malicious injury," but instead constituted reckless disregard of a professional duty of care, a type of conduct which Congress indicated, at least in its legislative history, was even subject to dischargeability.[1]

---

[1] Paragraph 5 provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902) [sic 193 U.S. 473 (1904)] held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 365, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6320-21; S. Rep. No. 989, 95th Cong., 1st Sess. 79, *reprinted in id.* at 5865.

Memorandum Opinion and Order

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

THOMAS L. SCHARFFE, D.P.M.,
Debtor.

CASE NO. 84-01779-BE

BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs,

A.P. #84-0363-BE

v.

T. L. SCHARFFE, D.P.M.,
Defendant.

APPEARANCES:
FRANK M. QUINN
Counsel for Plaintiffs
Bay City, Michigan 48706

JOHN J. HEBERT, Esq.
Counsel for Defendant
Bay City, Michigan 48707

MEMORANDUM OPINION AND ORDER

STANLEY B. BERNSTEIN
U.S. Bankruptcy Judge

The plaintiffs in this proceeding seek a determination of nondischargeability of their claim against the debtor. That claim had been liquidated under a consent judgment in the plaintiffs' medical malpractice action against the defendant in state court.

The debtor is a licensed podiatrist. Plaintiff Betty Perkins started treatment for pain in several toes on her left foot with the debtor on August 25, 1980. The initial treatment by the debtor was noninvasive in nature, *i.e.*, the placing of wedges between toes and providing insoles for her shoes. On September 9, the debtor

injected the plaintiff's foot with a steroid and local anesthetic combination; within two days of that injection the plaintiff's foot displayed signs of infection.

Much of the testimony at trial concerned the circumstances surrounding the injection and the debtor's ensuing treatment. This included extensive expert testimony whether those actions conformed to the standard of care imposed upon podiatrists. This testimony was presented in support of the plaintiff's legal argument that this debt was nondischargeable if the debtor intended to do certain acts and those acts were negligently performed so that the injury which resulted could be considered willful or malicious.

Debts arising from tortious acts are generally dischargeable in bankruptcy. The exception to that general rule is found in 11 U.S.C. §523(a)(6):

> A discharge . . . does not discharge an individual debtor from any debt —
>
> * * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

The case law in this area has taken widely different views as to what constitutes "willful and malicious" under §523(a)(6). Much of this diversion has been caused by a strained construction of the Code in situations in which the court has determined, for policy reasons, that the debt *should* be nondischargeable. Most of these unconventional cases have dealt with personal injuries caused by intoxicated drivers.[1]

---

[1]Congress has responded to the policy expressed by many courts in these drunk driving cases. The 1984 amendments to the Code make nondischargeable judgments arising out of injuries caused by intoxicated drivers. P.A. 98-353, §371 amending 11 U.S. §523.

An excellent construction of §523(a)(6) was presented in *Morales v. Tanner (In re Tanner)*, 31 Bankr. Rptr. 339 (Bankr. S.D. Fla. 1983). The plaintiff sought a determination of nondischargeability for a judgment she had received in a medical malpractice action against the podiatrist debtor. The state court had awarded both compensory and punitive damages.

The *Tanner* court found that willful, as used in §523(a)(6), means intentional or deliberate, citing the legislative history. H.R. 95-595, 95 Cong., 1st Sess. 363 (1977), *reprinted in* [1978] U. S. Code Cong. & Admin. News 5787. As such, willfulness refers to an intentional act; a finding of negligence is not sufficient. 31 Bankr. Rptr. at 339. With respect to the interpretation of malicious, the court stated:

> Acts have been held to be 'malicious' pursuant to Bankruptcy Code Section 523(a)(6) if they are wrongful and without just cause or excessive, *In re La Brant*, or wrongful acts done without just cause or excuse, *In re Askew*, 22 B.R. 641 (M.D. Ga. 1982), *Matter of Grace*, 22 B.R. 653 (E.D. Wis. 1982). The case of *In re Donny*, 19 B.R. 354 (W.D. Wis. 1982) held that an injury is willful and malicious if the debtor knew that an injury would be caused and proceeded in the face of this knowledge to carry out the actions which would cause injury. Personal hatred and ill will are not elements of malice pursuant to Bankruptcy Code Section 523(a)(6). *Matter of Chambers*.

Id.

The plaintiff relies on *First National Bank of Albuquerque v. Franklin (In re Franklin)*, 726 F.2d 606 (10th Cir. 1984). Although *Franklin* also arises in a medical malpractice context, it is distinguishable from the present proceeding.

The debtor in *Franklin* was a surgeon who was held responsible for anesthesia given to a minor during an appendectomy. The

plaintiff bank was the guardian of the minor's estate. The debtor failed to obtain any medical history prior to surgery and over-anesthetized the patient. The boy suffered cardiac arrest during surgery and was severely brain damaged as a result. A default judgment awarding compensatory damages was entered in state court; a trial was held on the issue of punitive damages. Those damages were also awarded and affirmed on appeal.

The primary issue presented in *Franklin* involved the deference to be paid to state court findings in bankruptcy proceedings, *i.e.*, whether a state court judgment has res judicata or collateral estoppel effect. The discussion of willful and malicious conduct under §17a(8) of the Act has very little applicability here because of substantive changes reflected in the legislative history to §523(a)(6) of the Code; those changes will be discussed below.

The facts in *Franklin* presented extraordinary circumstances. Not only was the malpractice blatant and the injuries catastrophic, but the record revealed that the doctor had intentionally destroyed records to cover up his errors. Those extremes, in combination with the looser standard for nondischargeability under the Act, resulted in the appellate court's affirmation of the bankruptcy court's finding of nondischargeability.

The legislative history to §523(a)(6) of the Bankruptcy Code reveals a clear congressional rejection of the case law under the Act which grounded a finding of willful and malicious conduct upon negligence. As summarized in Colliers:

> An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will. The word "willful" means "deliberate or intentional", a deliberate and intentional act which necessarily leads to injury . . . .
>
> A claim or judgment based merely upon negligence does not necessarily constitute a willful and malicious

> injury within the exception even if the negligence is alleged to be reckless and wanton . . . Cases decided under section 17a(2) of the Bankruptcy Act, such as *Tinker v. Colwell* [193 U.S. 473 (1904)] holding that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

3 Collier on Bankruptcy ¶523.16 at 523-118 — 523-122 (15th ed. 1979) (footnotes omitted). Congress intended to eliminate injuries caused by negligence from those debts deemed nondischargeable — even when the act of negligence is so reckless and wanton as to be characterized as gross negligence.

The record in this proceeding supports the finding that the debtor caused the infection by injecting an unsterile needle into the deep tissue of Mrs. Perkings' foot and that his treatment of that infection did not meet the appropriate standard of care. He failed to test the infected area in a timely manner; he failed to prescribe the drugs of choice required by the laboratory analysis; and he failed to hospitalize the plaintiff when further laboratory analysis showed that only hospital-strength antibiotics administered intravenously could combat the virulent infections. This Court, therefore, finds that the plaintiffs' injuries were caused by the debtor and that, under the tort law of this state, they are entitled to damages. No evidence was, however, admitted to support the finding that the debtor intended to harm Mrs. Perkins. Proof that the debtor injected an unsterile syringe and prescribed ineffective medications is not proof of willful and malicious injury. It is not the intent to inject the syringe or prescribe the medications that satisfies the statute; it is the intent to cause harm that has to be proven. Although this Court may regard the debtor's treatment of this plaintiff to be absolutely appalling, that conduct did not rise to the level of an intentional tort contemplated in §523(a)(6).

The Bankruptcy Code makes no special provision for the nondischargeability for damages caused by negligence. That policy may be ill-advised, but it is the law as it presently stands. *See Foell v. Hungate* (*In re Hungate*), 2 Bankr. Ct. Dec. 1046 (Bankr. E.D. Mich. 1976). The consent judgment entered into between these plaintiffs and the debtor is determined to be dischargeable.

IT IS SO ORDERED.

STANLEY B. BERNSTEIN
U. S. Bankruptcy Judge

Dated: August 2, 1984

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

THOMAS L. SCHARFFE, D.P.M.,
Debtor.

Case No. 84-01779-BE

BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs,

A.P. No. 84-0363-BE
Honorable Stanley B. Bernstein

vs.

T. L. SCHARFFE, D.P.M.,
Defendant.

NOTICE OF APPEAL

Betty L. Perkins and Harry A. Perkins, Plaintiffs, appeal to the District Court from the Final Order of Bankruptcy Court dated August 2, 1984, and entered in this adversary proceeding on the 3rd day of August, 1984. The parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

Dr. Thomas L. Scharffe, D.P.M., Defendant
Attorney John J. Hebert (P14806)
309 Davidson Building
P.O. Box 835
Bay City, Michigan 48707
(517) 893-3518

Memorandum, Opinion, and
Order of Bankruptcy Court

BRAUN, KENDRICK, FINKBEINER,
SCHAFER & MURPHY
BY: (s) Frank M. Quinn (P19155)
Attorneys for Plaintiffs
201 Phoenix Building
Bay City, Michigan 48706
(517) 895-8505

Dated: August 10, 1984

Memorandum Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

CASE NO. 84-3816

THOMAS L. SCHARFFE, DPM
Debtor,
BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs — Appellants,

-v-

THOMAS L. SCHARFFE,
Defendants — Appellee

COURT'S OPINION

PROCEEDINGS had and (excerpt) of the above-entitled matter before the Honorable Horace C. Gilmore, a U.S. District Judge, held Thursday, 8/25/85, Federal Building, 8th Floor; Detroit, Michigan 48226.

Appearances:

MARK SMITH, *Attorney at Law*
P.O. Box 835
Bay City, Michigan 48707
On behalf Defendant — Appellee

Frank M. Quinn, *Attorney at Law*
201 Phoenix Building
Bay City, Michigan 48706
On behalf of Plaintiff — Appellant

Memorandum, Opinion, and Order of Bankruptcy Court

Detroit, Michigan
Thursday, August 25, 1985
Afternoon Session

JUDGE'S OPINION

THE COURT: Thank you both very much. This case is an appeal from the Bankruptcy Court proceeding involving a Dr. Scharffe, a pediatrist, appellants, and the Bankruptcy Court had held the debt to be dischargeable that arose out of an alleged medical malpractice were pretty bad, at least, the bankruptcy. It was absolutely appalling. The appellants are the creditors. A suit was filed in Wayne County Circuit Court alleging malpractice and was filed in Bankruptcy shortly after the case was scheduled to go to trail. After the automatic stay was lifted, the parties settled the case for a hundred and eighty thousand ($180,000) and now, there's a dischargeability of the judgment of bankruptcy after a hearing that the debt was dischargeable.

Now, there's a claim in the appeal that are on basically two grounds: First, in the standard, the debt is willful and malicious injury was improperly applied by the Bankruptcy Court and that certain evidence relating to the application of prior treatment of other patients in a similar way and similar results were excluded improperly. Now, 11 USC with reference to the first issue, whether the debt was properly discharged by Judge Bernstein, — 11 USC 526, exception to discharge and bankruptcy and it states specifically, a discharge does not discharge a individual debtor from any intent for willful and malicious injuries from a debt to the property of another entity and the bankruptcy judgment is that it is not the intent to inject a severing* that satisfies the statute and held that it was the intent to cause harm that has to be proven and held — he held that the actions even though it was grievious and and did not amount to a willful and malicious

injury, the appellant relies on Tinker versus Caldwell; but 193 US 473, a 1904 case, U.S. Supreme Court case, which applies reckless disregard standards negligent judjment in discharge bankruptcy debts.

However, I think it is clear in my mind, at least, that the Tinker case has been expressly overruled to the inactionment of 11 USC 526, the only authority is a 9th Circuit case that we have found is 1637 Reporter 671, 1984 case where that circuit's bankruptcy was appealed — held that the construction of the statute which allowed for a non-dischargeability of less dischargeability as expressly inactionment of 11 USC. So I doubt there is merit on this point and I will therefore affirm the bankruptcy on the standards used to determine malicious and willful with reference to the second issue, it's been conceded by the — If I adopt such a standard that, really, it would be similar acts would be irrelevant but I want to comment on it, anyway. The bankruptcy judge excluded evidence establishing sought to be offered which would show that five individuals had been harmed by this person and the four of them had filed civil actions which were later settled and dismissed. Now, I think in that case that even though it was error that excludes them, it was harmless error and there was the question as to whether it was admissible under 404 B. And, finally, I think probably the most — other than the one I think was erred in Congress as one is probative value outweighed by its prejudicial effect, Federal Rules of Evidence 403. For those reasons, I will affirm the determination of the Bankruptcy Court.

(Proceedings concluded.)

* * *

CERTIFICATE OF COURT REPORTER:

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS
CITY OF DETROIT)

I, BERNEDA G. WILKINS, CSR 2240, reported the proceedings taken in the matter of Thomas L. Scharffe, DPM; Case No. 84-3816, before Honorable Horace C. Gilmore, a U.S. District Judge, Federal Court; held Thursday, 8/25/85; that the same was reduced to typewritten form under my supervision, and that the attached 5 pages constitute a full, true and accurate transcript of my stenotype notes.

(s) Berneda G. Wilkins
Court Reporter

Dated: Friday, October 11, 1985

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTY L. PERKINS
Plaintiff,

vs.

T. L. SCHARFFE
Defendant

CIVIL ACTION NO. 84-3816
BANKRUPTCY # 83-00204
ADVERSARY # 83-0283

ORDER AFFIRMING BANKRUPTCY COURT

At a session of said Court held in the United States Federal Courthouse, Detroit, Michigan, on May 31, 1985.

PRESENT: HONORABLE HORACE W. GILMORE
U.S. FEDERAL DISTRICT JUDGE

This matter being before this Court on appeal from the United States Bankruptcy Court of this district; briefs having been submitted and arguments of counsel being heard; IT IS ORDERED THAT the action of the Bankruptcy Court be affirmed.

(s) Horace W. Gilmore
United States District Judge

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:
THOMAS L. SCHARFFE, D.P.M.,
Debtor.
BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs-Appellants,

vs.

T. L. SCHARFFE,
Defendant-Appellee.

Bankruptcy Case
No. 84-01779-BE

Civil Action No. 84-381
Judge Gilmore
Bankruptcy Adversary Proceeding
No. 83-0283

United States Court of Appeals
for the Sixth Circuit
No. _____

NOTICE OF APPEAL

Notice is hereby given that creditors, Betty L. and Harry A. Perkins, do hereby appeal to the United States Court of Appeals for the Sixth Circuit from the order of the above-named District Court entered on May 31, 1985, granting to the above-named debtor, T. L. Scharffe, D.P.M., a discharge from the claim of Betty L. and Harry A. Perkins, and affirming the order of the Bankruptcy Court entered by the honorable Stanley B. Bernstein, Bankruptcy Judge for the Eastern District of Michigan. The Party to the Order appealed from and the name and address of his attorney are: Dr. T. L. Scharffe, D.P.M., Defendant-Appellee,

Attorney John J. Hebert, 309 Davidson Building, P.O. Box 835, Bay City, Michigan, 48707.

BRAUN, KENDRICK, FINKBEINER,
SCHAFER & MURPHY
Attorneys for Plaintiffs-Appellants

Dated: June 27, 1985

(s) Frank M. Quinn
FRANK M. QUINN (P19155)

and

(s) Daniel S. Opperman
DANIEL S. OPPERMAN (P33159)
201 Phoenix Building
Bay City, Michigan 48708

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-184

In the Supreme Court for the United States

October Term, 1987

THOMAS L. SCHARFFE, D.P.M.,
Petitioner,

v

BETTY L. PERKINS and HARRY A. PERKINS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SCOTT C. STRATTARD
(P33167)
812 Second National Bank Bldg.
Saginaw, Michigan 48607
Telephone: (517) 753-3461
Counsel of Record

DANIEL S. OPPERMAN
(P33159)
201 Phoenix Building
Bay City, Michigan 48708
Telephone: (517) 895-8505
Counsel for Respondents

FRANK M. QUINN
(P19155)
201 Phoenix Building
Bay City, Michigan 48708
Telephone: (517) 895-8505
Counsel for Respondents

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
DETROIT, MICHIGAN 48226 (313) 964-3185

QUESTIONS PRESENTED

1. IN ORDER TO PROVE "WILLFUL AND MALICIOUS INJURY" UNDER THE PROVISIONS OF 11 U.S.C. 523(a)(6) MUST THE CREDITOR PROVE SPECIFIC INTENT TO CAUSE A SPECIFIC INJURY OR IS IT SUFFICIENT TO PROVE A WRONGFUL ACT DONE INTENTIONALLY WHICH NECESSARILY PRODUCES HARM AND IS WITHOUT JUST CAUSE OR EXCUSE?

2. UNITED STATES BANKRUPTCY JUDGE STANLEY B. BERNSTEIN FOUND THAT THE PETITIONER "...CAUSED THE INFECTION BY INJECTING AN UNSTERILE NEEDLE INTO THE DEEP TISSUE OF MRS. PERKINS' FOOT AND THAT HIS TREATMENT OF THAT INFECTION DID NOT MEET THE APPROPRIATE STANDARD OF CARE. HE FAILED TO TEST THE INFECTED AREA IN A TIMELY MANNER; HE FAILED TO PRESCRIBE THE DRUGS OF CHOICE REQUIRED BY THE LABORATORY ANALYSIS; AND HE FAILED TO HOSPITALIZE THE PLAINTIFF WHEN FURTHER LABORATORY ANALYSIS SHOWED THAT ONLY HOSPITAL-STRENGTH ANTIBIOTICS ADMINISTERED INTRAVENOUSLY COULD COMBAT THE VIRULENT INFECTIONS."

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FOUND: "THE PROOF SHOWED THAT DR. SCHARFFE UNNECESSARILY INJECTED MRS. PERKINS' LEFT FOOT WITH AN UNSTERILE NEEDLE OR CONTAMINATED MEDICATION. THEREAFTER, HE FAILED TO PERFORM TIMELY TESTS WHEN RESULTANT INFECTION WAS APPARENT. DR. SCHARFFE THEN IGNORED

THE RESULTS OF BELATED TESTS THAT IDENTIFIED THE OFFENDING BACTERIA AND DISCLOSED THE APPROPRIATE DRUGS AND DRUG STRENGTHS TO COMBAT THEM. FINALLY, DR. SCHARFFE FAILED TO HOSPITALIZE MRS. PERKINS WHEN HOSPITALIZATION WAS URGENTLY NEEDED.''

IS THERE RECORD SUPPORT FOR THE ABOVE-REFERENCED FINDINGS AND THE CONCLUSION BY THE SIXTH CIRCUIT THAT DR. SCHARFFE COMMITTED INTENTIONAL WRONGFUL ACTS WHICH NECESSARILY PRODUCED HARM WITHOUT JUST CAUSE OR EXCUSE, GIVEN DR. SCHARFFE'S TESTIMONY THAT EACH AND EVERY STEP OF HIS TREATMENT WAS DONE INTENTIONALLY WITH THE KNOWLEDGE OF THE CONSEQUENCES OF A FAILURE TO PROPERLY TREAT INFECTIOUS ORGANISMS?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, **THOMAS L. SCHARFFE, D.P.M.** and Respondents **BETTY L. PERKINS and HARRY A. PERKINS.**

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STATEMENT OF THE CASE

Petitioner Scharffe mischaracterizes the issues that are truly presented by his Petition. Petitioner Scharffe asserts that the Circuit Court adopted a "reckless disregard" standard for purposes of satisfying the "willful and malicious" language of the nondischargeability section of the Bankruptcy Act when at no time did the Respondents seek such a reckless disregard standard and when nowhere in the Sixth Circuit Opinion is a reckless disregard standard even mentioned. The real issue in this regard is whether Respondents Betty and Harry Perkins had to prove that Dr. Scharffe intended a specific injury to Betty Perkins or whether they had to prove that Dr. Scharffe intentionally committed a wrongful act that necessarily produced harm without just cause or excuse.

The "clearly erroneous" issue postulated by the Petitioner is a red herring because the Sixth Circuit essentially adopted the trial court's factual findings when it concluded that Dr. Scharffe did, indeed, commit a wrongful act, done intentionally, which necessarily produced harm without just cause or excuse.

The Respondents further take vehement exception to the Petitioner's naked assertion that erroneous statements of fact and law were presented to the Sixth Circuit. It is revealing that Petitioner provides this Court with no examples. Similarly, there is no record support for the Petitioner's assertion that he was not represented by counsel in the Sixth Circuit due to "financial problems."

Betty Perkins first saw Dr. Scharffe on August 25, 1980 (R I. 17).[1] Mrs. Perkins was complaining of nagging pain in her left foot and in response to these complaints, Dr. Scharffe merely examined and manipulated Mrs. Perkins' foot (R I. 20). The doctor did not take a blood pressure reading, perform a gait or stance analysis, nor did he obtain x-rays (R I. 23, 24, 27, 28). The examination conducted by Dr. Scharffe was not sufficient to obtain a correct diagnosis and administer proper treatment (R II. 72). Despite his limited examination, Dr. Scharffe diagnosed neuroma (enlargement of a nerve) and plantar bursitis (enlargement or swelling of toe) (R I. 25-26). Dr. Scharffe prescribed some padding for her foot (R I. 29).

On September 9, 1980, Dr. Scharffe injected a steroid (cortizone) and local anesthesia (zylocaine and marcaine) near the third toe of Betty Perkins' left foot (R I. 38). This was contraindicated and clearly improper treatment per the testimony of the Respondents' expert, Dr. David T. Touchton (R II. 84). Two days later, on September 11, Betty Perkins, in great pain, was bedridden with compressions on her foot, which was elevated (R II. 10). Being concerned and unable to reach Dr. Scharffe, she went to the Saginaw General Hospital Emergency Room for x-rays (R I. 11). No fracture was revealed, but an infection was suspected and Mrs. Perkins was referred back to Dr. Scharffe for treatment (R II. 11).

Betty Perkins finally was able to contact Dr. Scharffe's office by phone on September 12, 1980, and reported that her foot was swollen and red, she was unable to move her toes, and that she had to go to the hospital emergency room the day

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[1] The trial transcript in this matter is in two separate volumes, both of which begin their page references with the number one. For ease of reference, R I refers to the first volume consisting of proceedings had on May 4, 1984, and R II refers to the second transcript volume reflecting proceedings had on June 28, 1984.

before (R I. 42). Dr. Scharffe prescribed an anti-inflammatory but not antibacterial drug, Tanderial, together with Uticillin and ice (R I. 42, 43). Uticillin as it turned out, would never be effective against the bacteria Betty Perkins had (R I. 61). At no time did Dr. Scharffe speak to Betty Perkins; he had his office assistant call her (R I. 44). Although Dr. Scharffe suspected an infection at this time, he performed no examination, nor did he obtain a specimen for culture and sensitivity testing, even though he knew that such testing is necessary to identify and effectively treat an infection (R I. 44, 50).

Dr. Scharffe was finally able to see Mrs. Perkins on September 13 and 14 (R I. 52). On these days, although signs of infection were obvious, Dr. Scharffe merely inserted a wick for drainage. He did not obtain a specimen for testing, an obvious and elemental first step to identifying bacterium that Dr. Touchton termed "absolutely crucial" (R II. 65). Per Dr. Touchton, standard podiatric practice known to all podiatrists absolutely requires such procedure, especially with an open wound (R II. 65). Further, Dr. Scharffe did not change Mrs. Perkins' medication or decide to place her in a hospital.

On September 15, Dr. Scharffe finally decided to obtain a culture (R I. 54). Three days later, Dr. Scharffe obtained lab results showing that Betty Perkins had staphylococus aureus and pseudomonas aeruginosa (hereinafter referred to as "staph" and "pseudomonas"), respectively, two well-known and very dangerous bacteria (R I. 55–56). Per Dr. Touchton these two deep tissue infections were caused by the inadequate

sterile techniques used by Dr. Scharffe, and the need for injection of these drugs into Betty Perkins was "totally unsupported" (R II. 53, 61, 83, 84).[2] Despite the fact that the laboratory report clearly indicated which antibiotics would be effective for the two infections and in which strengths, Dr. Scharffe did not follow the lab report, which he acknowledged was clear, and intentionally neither changed medication nor placed Betty Perkins in the hospital. He continued to administer medication which the sensitivity study did not indicate as effective (R I. 52, 56, 58, 70).

No improvement was made in Betty Perkins' foot, so Dr. Scharffe obtained another culture on September 22, 1980 (R I. 56). At the time, he noted that there was "much drainage, light orangish in color" (R I. 56). Dr. Scharffe again did not change medication or decide to hospitalize Betty Perkins, despite the 'spread' of pain up her calf and leg (R I. 68–69). Since Dr. Scharffe was a podiatrist, spread of symptoms and infection into the leg *mandated* prompt referral to a physician licensed and qualified to treat such conditions, as explained by Dr. Touchton (R II. 67–69).

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[2] The Respondents also sought to introduce evidence establishing that five prior patients of Dr. Scharffe had suffered from infections after receiving injections or surgical treatment from Dr. Scharffe and that Dr. Scharffe's "treatment" of the previous infections was similarly blatantly improper. This evidence was complied in an effort to prove that Dr. Scharffe had sufficient knowledge to establish his specific intent to harm Betty Perkins by treating her in the face of direct knowledge that he was following a disastrous course of treatment. At the very least, Respondents maintained that such proof was evidence of his knowledge of certain facts and the taking of action which directly contradicted an acceptable course of treatment. This evidence was not allowed (Pl. Ex. 4; R I. 4–5) and Respondents sought appellate review of that issue in the Sixth Circuit. Because of the holding of the Sixth Circuit on other issues, this issue was not addressed.

Three days later, the second culture test report showed that the staph infection remained "heavy," the highest classification, and the pseudomonas had gone from "few" to "heavy" (R I. 65, 66, 72). Per subsequent testimony of Dr. Scharffe's assistant, Dr. Wax, this test report should have been a "red flag" that the condition was then "foot threatening," if not "life threatening," and Betty Perkins should have been immediately hospitalized in isolation where appropriate IV strength antibiotics could be administered and properly monitored (Deposition of Dr. Wax, 29). Dr. Touchton echoed these sentiments (R II. 68). At that time, Dr. Scharffe finally switched to Geramycin, a drug originally indicated to combat the staph infection, but in inadequate strength, and by contra-indicated ointment rather than intravenously. Futher, he continued to fail to prescribe any proper antibiotic for the "pseudomonas" to be given intravenously (R I. 78–80). Dr. Scharffe "considered" hospitalization, but decided to wait (R I. 78). Of course, hospitalization would have required that he refer Betty Perkins to another doctor because Dr. Scharffe did not have hospital staff privileges (R I. 18). Hospitalization would also have allowed Betty Perkins to obtain the proper drugs in proper strength and form and would have isolated her from other elements (R I. 78–80). Unfortunately, neither Betty nor Harry Perkins recognized the seriousness of her situation because Dr. Scharffe had not informed them of the infecting bacteria (R II. 12).

By September 27, 1980, Betty Perkins could no longer stand the pain in her foot. Again, Dr. Scharffe was unavailable to examine or treat Betty Perkins, but his assistant, Dr. Wax, was available to see her (R I. 76). After examining Mrs. Perkins, Dr. Wax called Dr. Scharffe and recommended that Betty Perkins be immediately referred to a physician with hospital staff privileges so that she could be hospitalized in isolation and given the appropriate "hospital strength" antibiotics intravenously. Dr. Scharffe rejected this advice and ordered

Dr. Wax to tell Mr. and Mrs. Perkins to come in next week (R I. 77).

At that point, Mr. and Mrs. Perkins gave up on Dr. Scharffe and sought a medical doctor. Mrs. Perkins was immediately thereafter hospitalized in isolation and given proper intravenous antibiotics. After several lengthy hospitalizations and numerous surgical and medical treatments, Mrs. Perkins' foot and life were saved, but she is left with substantial disfigurement and disability.

After the condition of Betty Perkins stabilized and her life was saved, suit was brought against Dr. Scharffe in Bay County (Michigan) Circuit Court. Shortly before trial, a voluntary Chapter 7 Petition was filed by Dr. Scharffe with the Bankruptcy Court. Relief from the automatic stay under 11 U.S.C. §362 was granted and a consent judgment in the amount of $180,000.00 in favor of Mr. and Mrs. Perkins and against Dr. Scharffe was entered in the state court. That judgment specifically reserved the question of whether the debt would be dischargeable in bankruptcy to the Bankruptcy Court. A complaint to except the judgment debt of Dr. Scharffe from discharge was filed with the Bankruptcy Court.

Since the amount of the debt was fixed by consent judgment, the subsequent history of repeated lengthy hospitalizations, surgeries, disfigurement and disability is relevant here only insofar as it was the known predictable result of Dr. Scharffe's intentionally chosen mode of treatment (R II. 52–53). The intentional nature of Dr. Scharffe's chosen mode of treatment, its gross impropriety, and the undeniable conclusion that such an intentionally chosen mode of treatment predictably produced harm without just cause or excuse will be dealt with in more specificity in Argument II herein.

Trial as to the nondischargeability of the debt that arose by virtue of Dr. Scharffe's treatment of Mrs. Perkins was held

before U. S. Bankruptcy Judge Stanley B. Bernstein. Judge Bernstein's Memorandum Opinion and Order is set forth in the Appendix (A. 7a). Judge Bernstein concluded:

> "The record in this proceeding supports the finding that the debtor caused the infection by injecting an unsterile needle into the deep tissue of Mrs. Perkins' foot and that his treatment of that infection did not meet the appropriate standard of care. He failed to test the infected area in a timely manner; he failed to prescribe the drugs of choice required by the laboratory analysis; and he failed to hospitalize the plaintiff when further laboratory analysis showed that only hospital-strength antibiotics administered intravenously could combat the virulent infections." (A. 11a).

Judge Bernstein regarded Dr. Scharffe's treatment as "absolutely appalling" but nevertheless held the debt to be dischargeable because in his opinion there was no evidence to support a finding that Dr. Scharffe "...intended to harm Mrs. Perkins" (A.11a).

U. S. District Judge Horace C. Gilmore affirmed Judge Bernstein, but in so doing, relied upon a Bankruptcy Appeal Panel decision that has since been reversed by the Ninth Circuit Federal Court of Appeals. *In re Cecchini*, 780 F2d 1440 (1986). Judge Gilmore's Opinion is set forth in the Appendix (A. 15a).

Harry and Betty Perkins appealed to the Sixth Circuit Court of Appeals and the Sixth Circuit reversed, finding the debt to be nondischargeable (A. 1a). The Sixth Circuit essentially adopted Judge Bernstein's factual findings:

> "The proof showed that Dr. Scharffe unnecessarily injected Mrs. Perkins' left foot with an unsterile needle or contaminated medication. Thereafter, he failed to perform timely tests when resultant infection was apparent.

> Dr. Scharffe then ignored the results of belated tests that identified the offending bacteria and disclosed the appropriate drugs and drug strengths to combat them. Finally, Dr. Scharffe failed to hospitalize Mrs. Perkins when hospitalization was urgently needed." (A. 2a).

In holding the debt to be nondischargeable, the Sixth Circuit rejected the claim asserted by the Petitioner herein — namely that Mr. and Mrs. Perkins had to prove that Dr. Scharffe specifically intended to injure Mrs. Perkins. In so holding, the Sixth Circuit noted that *every* Circuit Court that has addressed the issue has adopted the standards set forth by the "leading bankruptcy treatise" 3 COLLIER ON BANKRUPTCY 523-111 (15th ed. 1986). (A. 4a). Specifically, the Court referenced the Ninth Circuit's decision in *Cecchini, supra; In re Franklin*, 726 F2d 606, 610 (10th Cir. 1984); *Matter of Quezada*, 718 F2d 121, 123 (5th Cir. 1983) *cert den*, 467 U.S. 1217, 104 S. Ct. 2662, 91 L Ed 2d 368 (1984); and *Seven Elves, Inc* v *Eskenazi*, 704 F2d 241, 245 (5th Cir. 1983).

Pursuant to Rule 22 of the Rules of the Supreme Court of the United States, Harry and Betty Perkins offer this Brief in Opposition to Dr. Scharffe's Petition for a Writ of Certiorari to the Sixth Circuit.

SUMMARY OF ARGUMENT

11 U.S.C. §523(a)(6) provides that a debt will not be discharged in bankruptcy if it arises from "willful and malicious injury by the debtor." It is apparent that this language, as applied to a debt arising out of improper medical or podiatric treatment, requires something more than simple malpractice or simple professional negligence on the part of the debtor. But Judges Bernstein and Gilmore stretched the statutory language to require proof that the debtor had a subjective and

specific intent to cause injury. In reversing, the Sixth Circuit did nothing more than follow what every other Federal Court of Appeals has decided when addressing this issue. Rather than adopt the almost impossible requirement that the Perkins prove a subjective, conscious and specific intent on the part of Dr. Scharffe to cause injury to Mrs. Perkins, the Sixth Circuit noted that it was following other circuits and the "leading" treatise on bankruptcy, 3 COLLIER ON BANKRUPTCY, 523-111 (15th ed. 1986). Under the COLLIER standard, the Sixth Circuit held that the Perkins were required to prove, and did prove, that Dr. Scharffe committed a wrongful act intentionally which necessarily produced harm without just cause or excuse (A. 5a). The Petitioner, therefore, has grossly mischaracterized the question presented in this lawsuit when he asserts that the Court below adopted a "reckless disregard" standard. Indeed, at no time did the court even consider a reckless disregard standard because at no time did the Perkins assert entitlement to a reckless disregard standard and nowhere to be found in the Sixth Circuit's Opinion is any reference to such a standard.[3]

The Petitioner also distorts the current state of the law regarding federal judicial interpretation of the "willful and malicious" language. The Petitioner claims a conflict among the circuits when in fact there is absolute uniformity. Indeed, there exists no Federal Court of Appeals' Decision that adopts the "conscious intent to injure" standard urged by the Petitioner. Instead, each and every circuit that has addressed this issue has held that the standard is precisely the same as that set forth in this case by the Court below. See *In re Cecchini*, 780

[3] Dr. Touchton did use the word "disregard" in his testimony, but in so doing, characterized the disregard as either "blatant" or "deliberate" (R II. 69, 70, 113-118). Dr. Touchton so characterized Dr. Scharffe's treating noting that it had to be "obvious" to Dr. Scharffe that Mrs. Perkins was in "jeopardy" (R II. 117).

F2d 1440 (9th Cir. 1986); *In re Franklin*, 726 F2d 606, 610 (10th Cir. 1984); *Matter of Quezada*, 718 F2d 121, 123 (5th Cir. 1983) *cert den*, 467 U.S. 1217, 104 S. Ct. 2662, 91 L Ed 2d 368 (1984); and *Seven Elves, Inc* v *Eskenazi*, 704 F2d 241, 245 (5th Cir. 1983). The nonexistence of any conflict among the circuits renders the Petitioner's Petition nonmeritorious pursuant to Rule 17 of the Rules of the Supreme Court of the United States.

Like the first question postulated by the Petitioner, the second question is also nonexistent in this case. The Sixth Circuit did not in any way reverse Judge Bernstein's factual findings. In fact, the Sixth Circuit's recitation of what the proofs disclosed is almost a verbatim rectitation of Judge Bernstein's findings. Indeed, on page 49 of the Perkins' Brief submitted to the Sixth Circuit, the Perkins requested the Sixth Circuit to "use" the factual findings of the Bankruptcy Court when applying the appropriate legal standard. The Bankruptcy Court found Dr. Scharffe's actions "absolutely appalling." The appeal to the Sixth Circuit had nothing to do with challenging Judge Bernstein's factual findings, but simply involved what standard of law was to be applied to those findings. There is ample record support for the trial court's findings, the Sixth Circuit's reiteration of the findings, and the rather self-evident conclusion that such facts establish that Dr. Scharffe's intentionally chosen mode of treatment was "wrongful" and "necessarily led to injury without just cause or excuse."

Because the "reckless disregard" standard was never at issue in this appeal and never adopted by the Sixth Circuit in this case, because there is a complete absence of any conflict among the circuits interpreting the "willful and malicious" language, and because the appeal to the Sixth Circuit never involved any challenge to the Bankruptcy Court's factual findings, neither question postulated by the Petitioner exists in this case, and the Petition does not satisfy Rule 17.

ARGUMENT

I.

THE PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS ABSOLUTE UNIFORMITY AMONG THE VARIOUS CIRCUIT COURTS THAT THE "WILLFUL AND MALICIOUS" STANDARD OF 11 U.S.C. 523(a)(6) DOES NOT REQUIRE PROOF OF A SPECIFIC INTENT TO CAUSE A SPECIFIC INJURY, BUT RATHER IS SATISFIED WHEN IT IS ESTABLISHED THAT THE DEBTOR INTENTIONALLY COMMITS A WRONGFUL ACT WHICH NECESSARILY PRODUCES HARM WITHOUT JUST CAUSE OR EXCUSE. RULE 17 OF THE SUPREME COURT OF THE UNITED STATES IS THEREFORE NOT SATISFIED.

In asserting that the Sixth Circuit has ignored the Bankruptcy Reform Act of 1978, Petitioner ignores, or conveniently fails to acknowledge, that in the nine years that have elapsed since the Bankruptcy Reform Act of 1978, not one Federal Court of Appeals panel in any circuit has adopted the next to impossible burden of proof Petitioner urges herein — namely proving a conscious and specific intent to cause injury. Instead, the various circuits have uniformly adopted the test set forth in 3 COLLIER ON BANKRUPTCY, 523-111 (15th ed. 1986). The COLLIER standard is set forth below and it is useful to note at the outset that this standard can be

found in the 1986 edition of COLLIER, an edition published eight years after the enactment of the Bankruptcy Reform Act of 1978:

> "The word 'willful' means 'deliberate or intentional', a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury."

It has been uniformly held that the viability of the COLLIER test remains, even assuming, *arguendo*, that legislative history, as opposed to legislative enactment, were somehow controlling. The Petitioner completely mischaracterizes the Ninth Circuit's decision in the case of *In re Cecchini*, 780 F2d 1440 (1986). Petitioner wrongfully characterizes *Cecchini* as supporting his claim that there should be a factual showing of conscious intent to harm. In fact *Checchini* holds just the opposite and is in accord with the holding of the Sixth Circuit in this case. It is first significant to note that *Cecchini* specifically acknowledges the abandonment of the "reckless disregard" standard. *Cecchini* then goes on to adopt the very standard set forth in COLLIER, quoted above, and adopted by the Sixth Circuit in this case:

> "When a wrongful act such as conversion, done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' *even absent proof of a specific intent to injure.*" *Cecchini, supra*, 1443 (emphasis added).

Cecchini does *not* support the Petitioner's position. Rather, it specifically *rejects* it.

Petitioner's reliance on *In re Adams*, 761 F2d 1422 (1985) is likewise misplaced. As *Cecchini, supra*, noted, although *Adams* is not "wholly determinative" of the appropriate interpretation of §523(a)(6), ". . . it supports plaintiff's interpretation of

the statute", which is the same interpretation urged successfully below by Mr. and Mrs. Perkins. *Cecchini*, 1443.

Further evidence that Dr. Scharffe stands alone in his quest for an almost impossible standard regarding nondischargeability is his claim that *In re Quezada*, 718 F2d 121 (1983) *cert den*, 467 U.S. 1217, 104 S. Ct. 2662, 91 L Ed 2d 368 (1984) supports his lonely contention. Like virtually every other Federal Court of Appeals' decision interpreting §523(a)(6), and like the Sixth Circuit did in this case, the *Quezada* court adopted the test set forth in the COLLIER treatise and quoted precisely that same section of COLLIER that the Sixth Circuit quoted in this case. *Quezada* did, however, hold the debt to be nondischargeable because of the facts of that case. Specifically, the *Quezada* court noted that:

> "Other than their harboring of the animal and *inadvertently* permitting it to escape, no action or conduct by the Quezadas caused or contributed to the attack by the dog upon the child." *Quezada, supra*, 122 (emphasis added).

In *Quezada*, the debtors did not intend the act that caused the injury — namely allowing the dog to escape. Here, Dr. Scharffe admittedly and intentionally chose a course of treatment that "necessarily led to injury without just cause or excuse" (R II. 53, 69-71). Dr. Scharffe admitted that he intended to treat Betty Perkins precisely as he did throughout the time that he treated her (R I. 83). The test reports were clear to him but he chose not to administer the drugs which the sensitivity tests showed to be indicated.

Given the fact that the *Quezada* court adopted the same legal standard as did the Sixth Circuit in this case, but applied it to different facts, it is the height of irony that the Petitioner wrongfully accuses the Respondents as having challenged factual findings, when in reality it is the Petitioner attempting to do so by claiming a misplaced reliance on *Quezada*.

As is evident from the foregoing, although the Petitioner claims a conflict exists among the various circuits, there quite simply is nothing but uniform adoption of the same standard approved by the Sixth Circuit in this case, and offered by the leading treatise in the field of bankruptcy law. As the Court below noted:

> "The Circuit Courts, however, which have addressed this question have adopted the looser standard. See *In re Cecchini*, 780 F2d 1440 (9th Cir. 1986); *In re Franklin*, 726 F2d 606, 610 (10th Cir. 1984); *Matter of Quezada*, 718 F2d 121, 123 (5th Cir. 1983) *cert den*, 467 U.S. 1217, 104 S. Ct. 2662, 91 L Ed 2d 368 (1984); and *Seven Elves, Inc* v *Eskenazi*, 704 F2d 241, 245 (5th Cir. 1983)." (A. 3a).

Ordinarily Respondents would stop at this point. Respondents feel compelled, however, to comment on three blatant inaccuracies in the petition, the last of which is particulary egregious in nature. First, the Petitioner miscites and misrepresents the true holding of the Ninth Circuit in *Cecchini*. Next the Petitioner accuses the Respondents of misrepresenting the facts and the law to the Sixth Circuit without providing any examples. Lastly, the petition contains a blatant and apparently intentional misrepresentation of the holding in *In re Tanner*, 30 BR 338 (U.S. Bk. Ct. Fla. 1983). Petitioner's quotation from page 339 of the *Tanner* case deletes the word "either," replaces a comma with a period, and replaces the word "or" with the word "and," resulting in a violent distortion of the *Tanner* holding. Petitioner's quotation from *Tanner*, as it appears on page 11 of his Petition, is reproduced verbatim below:

> "In order for this Court to find the judgment debt to be nondischargeable, the plaintiff must prove by clear and convincing evidence that the Debtor performed surgery upon the foot of the Plaintiff Morales with intent to injure Mr. Morales. That the surgery was intended when performed without just cause or excuse and that he knew he

would injure Mr. Morales and performed the surgery in the face of that knowledge." Petitioner's Petition, 11.

What the *Tanner* case *really* says is reproduced below, verbatim, with those things that are different from the Petitioner's quote of *Tanner* emphasized:

> "In order for this Court to find the judgment debt to be nondischargeable, the plaintiff must prove by clear and convincing evidence that *either* the debtor performed surgery on the feet of the plaintiff, Mr. Morales, with the intent to deliberately injure Mr. Morales, that the surgery was intentionally performed without just cause or excuse *or* that the debtor knew he would injure Mr. Morales and performed the surgery in the face of that knowledge." *Tanner, supra*, 339.

Tanner therefore allows proof that a debtor had the requisite intent under 11 U.S.C. §523(a)(6) in three ways:

> (1) by proof that the debtor performed an act with deliberate intent to injure; *or*
>
> (2) that surgery or other medical care was intentionally performed without just cause or excuse; *or*
>
> (3) that the debtor knew the selected course of treatment would result in injury and such a course of treatment was performed in the face of that knowledge.

As discussed in Argument II, *infra*, Dr. Scharffe's acts and omissions satisfy two of the three *alternative* methods of establishing the requisite intent set forth in *Tanner*. Dr. Scharffe's treatment was an intentionally chosen mode without any just

cause or excuse, and further Dr. Scharffe knew the consequences of failing to properly treat infectious organisms (R I. 81-83).[4]

II.

THE FINDINGS OF THE BANKRUPTCY COURT TRIAL JUDGE THAT THE PETITIONER CAUSED AN INFECTION BY INJECTING AN UNSTERILE NEEDLE INTO MRS. PERKINS' FOOT; THAT THE PETITIONER FAILED TO TEST THE INFECTED AREA IN A TIMELY MANNER; THAT THE PETITIONER FAILED TO PRESCRIBE THE DRUGS OF CHOICE REQUIRED BY THE LABORATORY ANALYSIS; AND THAT THE PETITIONER FAILED TO HOSPITALIZE THE PLAINTIFF WHEN FURTHER LABORATORY ANALYSIS SHOWED THAT ONLY HOSPITAL-STRENGTH ANTIBIOTICS ADMINISTERED INTRAVENOUSLY COULD COMBAT THE INFECTION, WHICH WERE ESSENTIALLY ADOPTED BY THE SIXTH CIRCUIT IN THIS CASE, ARE AMPLY SUPPORTED BY THE RECORD AND UNDENIABLY SUPPORT THE SIXTH CIRCUIT'S CONCLUSION THAT DR. SCHARFFE COMMITTED WRONGFUL ACTS INTENTIONALLY WHICH NECESSARILY PRODUCED HARM WITHOUT JUST CAUSE OR EXCUSE.

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[4] Petitioner's blatant misrepresentation of *Tanner* hardly seems inadvertent. If inadvertent, it is the only part of this case that involves "*reckless* disregard." Respondents therefore request that this Court, when denying the Petition for Certiorari, also assess costs against the Petitioner. Rules 49.2 and 50.7 of the Rules of The United States Supreme Court.

As may be evident from the distorted discussion of case law postulated by the Petitioner, it is really the Petitioner that challenges the factual findings made in the Courts below. The Respondents' appeal to the Sixth Circuit involved no challenge to the factual findings of Judge Bernstein, but challenged Judge Bernstein's application of a legal standard requiring conscious and specific intent to injure when no Federal Court of Appeals from any circuit has held that such a requirement exists. The question before the Sixth Circuit was, therefore, whether Judge Bernstein's factual findings support a legal determination of nondischargeability under the proper standard set forth in COLLIER and adopted by every Circuit Court that has had occasion to address the issue. As evidenced below, Judge Bernstein's findings, which were essentially adopted by the Sixth Circuit, amply support the Sixth Circuit's conclusion that Dr. Scharffe committed a deliberate and intentional act which necessarily led to injury without just cause or excuse. Further, these factual findings are more than amply supported by the record, which will also be demonstrated below.

Judge Bernstein found as fact the following:

> "The record in this proceeding supports the finding that the debtor caused the infection by injecting an unsterile needle into the deep tissue of Mrs. Perkins' foot and that his treatment of that infection did not meet the appropriate standard of care. He failed to test the infected area in a timely manner; he failed to prescribe the drugs of choice required by the laboratory analysis; and he failed to hospitalize the plaintiff when further laboratory analysis showed that only hospital-strength antibiotics administered intravenously could combat the virulent infections." (A. 11a).

The Sixth Circuit essentially adopted Judge Bernstein's factual findings when it commented:

> "The proof showed that Dr. Scharffe unnecessarily injected Mrs. Perkins' left foot with an unsterile needle or contaminated medication. Thereafter, he failed to perform timely tests when resultant infection was apparent. Dr. Scharffe then ignored the results of belated tests that identified the offending bacteria and disclosed the appropriate drugs and drug strengths to combat them. Finally, Dr. Scharffe failed to hospitalize Mrs. Perkins when hospitalization was urgently needed." (A. 2a).

The record more than amply supports the above-referenced findings by Judge Bernsein, and adopted by the Sixth Circuit when it concluded that such facts self-evidently satisfy the test requiring the commission of a wrongful act done intentionally which necessarily produces harm without just cause or excuse.

That Dr. Scharffe's chosen mode of treatment was a conscious and intentional commission of an act, as opposed to simple inadvertence, is undeniable by virtue of his own testimony. Although the appropriate test does not require that the doctor also know the consequences of such improper treatment, but simply that such improper treatment necessarily produces the injury, Dr. Scharffe nevertheless testified that he did indeed know the consequences of his failure to properly treat infectious organisms:

> "Q. Okay. Now, doctor, directing your attention to the entire course of treatment here from August 25th 'til the last time you or anybody from your (sic) office saw her on September 27, 1980, you deliberately and continually decided not to hospitalize her at any time?
>
> A. In that period of time, no, I did not feel that she needed to be hospitalized.
>
> Q. Same goes for isolating?

A. No, I did not feel that she needed to be isolated.

Q. Same goes for referring her to a doctor with hospital privileges?

A. I didn't think it was necessary, no.

Q. You deliberately and continually decided not to put her where (sic) she could get IV (intravenous)-strength drugs?

A. As long as her foot was continuing to improve and look better when I saw her from period-to-period, I didn't think it was necessary to go through this.

Q. You knew that the pseudomonas had gone from few to heavy between the two cultures?

A. Yes. I did.

Q. At least as reported to you; is that right?

A. Yes.

Q. You knew the consequences of a failure to properly treat infectious organisms as far as what can result by way of serious disability, et cetera, as we've described?

A. We were watching her every two to three days —

THE COURT: Doctor Scharffe.

BY THE WITNESS:

A. Sometimes more often —

THE COURT: Doctor Scharffe, the question is: Did you know what the consequences — not what did you do, but what did you know. So why don't you answer the question yes or no.

THE WITNESS: Yes.

BY MR. QUINN:

Q. You knew that both of these bugs could grow rapidly, spread through the system?

A. Yes.

Q. And you saw a development, at least with regard to the pseudomonas of it going to few to heavy between the two cultures that you took?

A. Yes.

Q. You intended to treat Betty Perkins as you did throughout the time you treated her?

A. Could you treat that? I didn't —

Q. You intended to treat Betty Perkins as you did throughout the time that she was under your case?

A. Yes." (R I. 81–83)

With the above quoted portion of the record establishing the commission of an intentional act by Dr. Scharffe, application of the COLLIER test next requires that this intentionally chosen mode of treatment be established as wrongful. Dr. Touchton's testimony reveals several aspects of Dr. Scharffe's chosen mode of treatment that were not only wrongful, but "blatantly" so. Regarding Dr. Scharffe's initial failure to take a culture, Dr. Touchton testified that the need for such a culture is "absolutely crucial" in order to identify the nature of the bacteria and the medications that will kill it (R II. 65). Dr. Touchton also testified that the "predictable result" of not taking a culture at the first opportunity is that the doctor then is "guessing" as to what the treatment would be and ". . . if you guess wrong, the bacteria continue to worsen and spread to other areas. Exactly the facts of what happened here." (R II. 53, 66).

Dr. Touchton explained that the next wrongful aspect of Dr. Scharffe's intentionally chosen mode of treatment (or nontreatment if you will) was the doctor's deliberate failure to follow the lab reports which mandated that certain drugs be used to stop the spread of the infection. Dr. Touchton testified that Dr. Scharffe "completely disregarded" those drugs indicated by the laboratory report that were necessary to treat the

pseudomonas bacteria (R II. 66, 67). Dr. Touchton then testified that the infections at issue were at such a stage that hospitalization so as to allow the stronger and constant intravenous medication was required, but not undertaken by Dr. Scharffe (R II. 67).

Next, Dr. Touchton discussed the fact that the infection had spread into the calf and that at that point the condition was beyond the realm of simple podiatric care even though Dr. Scharffe limited treatment to podiatric care:

> "Q. As far as this — when it gets systematic, or beyond the foot that an M.D. or D.O. needs to be called in, is this something that's borderline or is that ought to be characterized as a blatant disregard of the care of the patient if you didn't do that?
>
> A. I believe it's blatant because I don't believe that the systemic infection which involves the whole body, which involves ordering the administering of IV antibiotics can be properly performed, *even legally performed, by a podiatrist. It would take an M.D. or a D.O. who would be in charge of the patient at any hospital setting any way in those situations to approve of the order, or even write the order.*" (R II. 69–70, emphasis added).

The above references to the record amply support the conclusion that Dr. Scharffe's intentional choice of treatment was wrongful, or in Judge Bernstein's words, "absolutely appalling" (A. 11a). Thus, this is not a case of simple malpractice. It is a case of knowing blatant disregard of clear information and of intentional inexcusable choice to treat contrary to test results, with predictable disastrous results.

In conclusion, the above-referenced testimony supports the factual findings of Judge Bernstein, which were adopted by the Sixth Circuit. At this point, it has been established that the record supports the Sixth Circuit's conclusion that Dr. Scharffe intentionally chose a mode of treatment that was wrong. The

next prong of the COLLIER test requires that such action "necessarily leads to injury." In this regard, Dr. Touchton testified as follows:

> "Q. Did Doctor Scharffe's choice to treat, as far as antibiotics, only with Dynapen until September 25th, 1980 *necessarily lead to further injury*?
>
> A. Yes.
>
> Q. Explain that.
>
> A. It was not an effective antibiotic for the organisms involved in her infection. It predictably would not work. It predictably would not produce the definitive results that would have been produced by any of the medications on the sensitivity chart which were indicated to him at the time he prescribed that to have been effective. If he had utilized the proper medication at the time of the culture, she would not have suffered the consequences that she did." (R II. 71, emphasis added).

With the record establishing an intentionally chosen mode of treatment that was wrongful that led to further injury, the last isue to be addressed is whether there is any "just cause or excuse" for the wrongful treatment:

> "Q. In your opinion, in having reviewed all of the records and the deposition and listening to the testimony you have, *is there any just cause or excuse for the doctor's failure to switch to the medications or to hospitalize where she could be monitored in isolation on IV — hospital-strength medications*?
>
> A. No." (R II. 71, emphasis added).

As is evident from the foregoing, Petitioner's second issue is a red herring. The Sixth Circuit simply adopted the findings of Judge Bernstein. It did not alter them. These findings are more than amply supported by the record. The Sixth Circuit's

conclusion that Dr. Scharffe's treatment was an intentionally chosen mode of treatment that was wrong that necessarily led to injury without just cause or excuse is virtually unassailable before this Court.

CONCLUSION

The issue presented by the Respondents on appeal to the Sixth Circuit had absolutely nothing to do with any "reckless disregard" standard. The issue presented before the Sixth Circuit was whether Harry and Betty Perkins had to prove that Dr. Scharffe had a conscious and specific intent to injure Betty Perkins, or whether they were required to prove that Dr. Scharffe intentionally chose a mode of treatment that was wrong and necessarily led to injury without just cause or excuse. The Sixth Circuit, in holding that there was no requirement to prove a conscious and specific intent to injure, simply ruled in accord with every other Federal Court of Appeals that has addressed this issue. Thus, although Petitioner claims conflict, there is but uniformity. Indeed, the absence of any conflict among the circuits is evidenced by Petitioner's misciteation to the holding of the Ninth Circuit in *Cecchini*, *supra*, and the Petitioner's blatant distortion of the Bankruptcy Court's holding in *Tanner*, *supra*. Because Petitioner's misquotation of *Tanner* is inaccurate in such a convenient way as it relates to the standard he urges, it serves as an appropriate basis to assess costs against the Petitioner and in favor of Harry and Betty Perkins in conjunction with the issuance of an order denying the Petition.

Like the first issue postulated by the Petitioner, the second issue is nonexistent. Harry and Betty Perkins did not even challenge Judge Bernstein's factual findings when appealing to the Sixth Circuit. The challenge involved appropriate application of a legal standard to these factual findings, and nothing more. These factual findings are more than amply supported by the record and the Sixth Circuit's conclusion

that these facts squarely meet the test set forth in COLLIER, and adopted by virtually every circuit that has addressed the issue, is self-evident.

For all of the foregoing reasons, the Respondents respectfully request that the Petition for a Writ of Certiorari to the Sixth Circuit be denied and that costs be assessed against the Petitioner.

Respectfully submitted,

BRAUN, KENDRICK, FINKBEINER,
SCHAFER & MURPHY

BY: _____
SCOTT C. STRATTARD (P33167)
812 Second National Bank Bldg.
Saginaw, Michigan 48607
Telephone: (517) 753-3461
Counsel of Record

BY: _____
FRANK M. QUINN (P19155)
201 Phoenix Building
Bay City, Michigan 48708
Telephone: (517) 895-8505
Counsel for Respondents

BY: _____
DANIEL S. OPPERMAN (P33159)
201 Phoenix Building
Bay City, Michigan 48708
Telephone: (517) 895-8505
Counsel for Respondents

Dated: August 26, 1987

APPENDIX

Opinion and Judgment of Court of Appeals

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 85-1555

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BETTY L. PERKINS and HARRY A. PERKINS,
Plaintiffs-Appellants,
v.
THOMAS L. SCHARFFE,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 5, 1987

Before: ENGEL and JONES, Circuit Judges; and ALLEN, Senior District Judge.*

ALLEN, Senior District Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. ENGEL, Circuit Judge, (p. 6) delivered a separate concurring opinion.

PER CURIAM. This case arises as an appeal from a decision rendered by the United States District Court for the Eastern District of Michigan affirming an order of the United States Bankruptcy Court for that district.

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*The Honorable Charles M. Allen, Senior District Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

Both the district Court and the bankruptcy court held that a judgment of $180,000.00, which the appellants had obtained against the appellee, was dischargeable in bankruptcy. Appellants contend that the judgment debt was non-dischargeable under 11 U.S.C. § 523(a)(6)(1979). Section 523(a)(6) provides: A discharge under this title does not discharge an individual debtor from any debt "—for willful and malicious injury by the debtor to another entity or to the property of another entity."

This case had its genesis in the medical-podiatric treatment of appellant Betty L. Perkins by the appellee, Dr. Scharffe, which both the Bankruptcy and District Judges correctly characterized as being absolutely appalling. The proof showed that Dr. Scharffe unnecessarily injected Mrs. Perkins's left foot with an unsterile needle or contaminated medication. Thereafter, he failed to perform timely tests when resultant infection was apparent. Dr. Scharffe then ignored the results of belated tests that identified the offending bacteria and disclosed the appropriate drugs and drug strengths to combat them. Finally, Dr. Scharffe failed to hospitalize Mrs. Perkins when hospitalization was urgently needed.

Harry and Betty Perkins filed suit against Dr. Scharffe in the Bay County Court in Michigan. Dr. Scharffe filed a Chapter 7 petition with the bankruptcy court and after the automatic stay pursuant to 11 U.S.C. § 362 (1979) was removed, the Bay County action was concluded by a negotiated consent judgment of $180,000.00. That judgment specifically reserved the question of dischargeability for the bankruptcy court's consideration.

The resolution of this case depends upon the interpretation given to the terms "willful" and "malicious", which appear in § 523(a)(6). The committee notes to the statute provide that "willful" means deliberate or intentional. The bankruptcy courts that have decided this matter have been divided as to whether the statute requires an intentional act that results in injury or an act with intent to cause injury. Those

which follow the more lenient standard are: *In re DeRosa*, 20 Bankr. 307 (Bankr.S.D. N.Y. 1982); *In re Fussell*, 15 Bankr. 1016 (W.D. Va. 1981); *In re McGiboney*, 8 Bankr. 987 (Bankr.N.D. Ala. 1981). Those that follow the stricter standard are *In re Finnie*, 10 Bankr. 262 (Bankr.D.Mass., 1981); *In re Hinkle*, 9 Bankr. 283 (Bankr.D.Md. 1981); and *In re Graham*, 7 Bankr. 5 (Bankr.D.Nev. 1980).

The circuit courts, however, which have addressed this question have adopted the looser standard. *See In re Cecchini*, 780 F.2d 1440 (9th Cir. 1986); *In re Franklin*, 726 F.2d 606, 610 (10th Cir. 1984); *Matter of Quezada*, 718 F.2d 121, 123 (5th Cir. 1983); and *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983).

In re Franklin is particularly instructive as it involves facts somewhat similar to the facts in the case at bar. In that case, Paul Sanchez was admitted to the hospital for an appendectomy. The operation was performed by appellant who was an osteopathic surgeon. Cardiac arrest occurred during the surgery and Sanchez suffered extensive brain damage. 726 F.2d at 608.

Legal proceedings were initiated against Dr. Franklin alleging reckless and willful medical care and claiming compensatory and punitive damages. After a default judgment had been entered awarding both compensatory and punitive damages the state appellate court reversed the award of punitive damages and a trial was held on that issue and resulted in a general verdict awarding punitive damages to Paul Sanchez. *Id.*

Both the bankruptcy court and the district court originally held that based upon the record and judgment in the state court the debt owed was nondischargeable. The Tenth Circuit Court of Appeals reversed those rulings because of its opinion that the bankruptcy court in making a discharge determination was not limited to review of the state court judgment and record. *In re Franklin*, 615 F.2d 909 (10th Cir.

1980). The bankruptcy court on remand held that the appellant was liable for willful and malicious injury to the person of another and that the debt was not dischargeable. On direct appeal from the Bankruptcy Court, the appellate court affirmed the decision of the bankruptcy court. The Court of Appeals after citing § 523 noted that no definition is given in the statute for the terms "willful" and "malicious." The court went on to state that the notes of the committee, as well as case law, has provided the meaning of those words, and that the notes state that "willful" means "deliberate or intentional." The court then observed that other courts have generally held that "willful" and "malicious" requires the intentional doing of an act that necessarily leads to injury. It also observed that this definition was accepted in *Den Haerynck v. Thompson*, 228 F.2d 72 (10th Cir. 1955). *Id.* at 610.

The court in *Franklin* found that there was sufficient evidence to support the finding of the bankruptcy court that the actions of the appellant amounted to a willful disregard of his duty and a complete and total disregard of acceptable medical practice and, therefore, constituted willful and malicious conduct. The court noted that there was a finding that the appellant prescribed an anesthetic without a patient history, overinduced the patient with anesthesia, and covered up two records pertaining to the surgery and subsequent cardiac arrest. *Id.*

We find that the facts in the case before us are very similar to the facts before the court in *Franklin* and we therefore reach the same conclusion as did the court in that case. Our opinion is reinforced by the leading bankruptcy treatise, which states:

> In order to fall within the exception of section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just

> cause or excessive, even in the absence of personal hatred, spite, or ill-will. The word "willful" means "deliberate or intententional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

3 COLLIER ON BANKRUPTCY 523-111 (15th ed. 1986).

For the reasons given above, the decision of the District Court is reversed.

ENGEL, Circuit Judge, concurring. I concur because I agree that the result reached by the majority is largely consistent with the position taken by the circuits which have addressed this same question, see particularly *Wheeler v. Laudani*, 783 F.2d 610 (6th Cir. 1986); *In re Franklin*, 726 F.2d 606 (10th Cir. 1984); *In re Cecchini*, 780 F.2d 1440 (9th Cir. 1985). Uniformity on this question is desirable because bankruptcy is an area in which "it is more important that the applicable law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Were we writing upon an entirely clean slate, however, I would have been inclined to agree with United States District Judge Horace C. Gilmore's conclusion of dischargeability. The conduct which occasioned the judgment against the bankrupt doctor, while agreed by all to be "appalling" was not "willful and malicious injury," but instead constituted reckless disregard of a professional duty of care, a type of conduct which Congress indicated, at least in its legislative history, was even subject to dischargeability.[1]

---

[1] Paragraph 5 provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902) [sic 193 U.S. 473 (1904)] held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 365, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6320-21; S. Rep. No. 989, 95th Cong., 1st Sess. 79, *reprinted in id.* at 5865.

Memorandum Opinion and Order

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

THOMAS L. SCHARFFE, D.P.M.,
Debtor.

CASE NO. 84-01779-BE

BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs,

A.P. #84-0363-BE

v.

T. L. SCHARFFE, D.P.M.,
Defendant.

APPEARANCES:
FRANK M. QUINN
Counsel for Plaintiffs
Bay City, Michigan 48706

JOHN J. HEBERT, Esq.
Counsel for Defendant
Bay City, Michigan 48707

MEMORANDUM OPINION AND ORDER

STANLEY B. BERNSTEIN
U.S. Bankruptcy Judge

The plaintiffs in this proceeding seek a determination of nondischargeability of their claim against the debtor. That claim had been liquidated under a consent judgment in the plaintiffs' medical malpractice action against the defendant in state court.

The debtor is a licensed podiatrist. Plaintiff Betty Perkins started treatment for pain in several toes on her left foot with the debtor on August 25, 1980. The initial treatment by the debtor was noninvasive in nature, *i.e.*, the placing of wedges between toes and providing insoles for her shoes. On September 9, the debtor

injected the plaintiff's foot with a steroid and local anesthetic combination; within two days of that injection the plaintiff's foot displayed signs of infection.

Much of the testimony at trial concerned the circumstances surrounding the injection and the debtor's ensuing treatment. This included extensive expert testimony whether those actions conformed to the standard of care imposed upon podiatrists. This testimony was presented in support of the plaintiff's legal argument that this debt was nondischargeable if the debtor intended to do certain acts and those acts were negligently performed so that the injury which resulted could be considered willful or malicious.

Debts arising from tortious acts are generally dischargeable in bankruptcy. The exception to that general rule is found in 11 U.S.C. §523(a)(6):

> A discharge . . . does not discharge an individual debtor from any debt —
>
> * * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

The case law in this area has taken widely different views as to what constitutes "willful and malicious" under §523(a)(6). Much of this diversion has been caused by a strained construction of the Code in situations in which the court has determined, for policy reasons, that the debt *should* be nondischargeable. Most of these unconventional cases have dealt with personal injuries caused by intoxicated drivers.[1]

---

[1]Congress has responded to the policy expressed by many courts in these drunk driving cases. The 1984 amendments to the Code make nondischargeable judgments arising out of injuries caused by intoxicated drivers. P.A. 98-353, §371 amending 11 U.S. §523.

Memorandum Opinion and Order

An excellent construction of §523(a)(6) was presented in *Morales v. Tanner (In re Tanner)*, 31 Bankr. Rptr. 339 (Bankr. S.D. Fla. 1983). The plaintiff sought a determination of nondischargeability for a judgment she had received in a medical malpractice action against the podiatrist debtor. The state court had awarded both compensory and punitive damages.

The *Tanner* court found that willful, as used in §523(a)(6), means intentional or deliberate, citing the legislative history. H.R. 95-595, 95 Cong., 1st Sess. 363 (1977), *reprinted in* [1978] U. S. Code Cong. & Admin. News 5787. As such, willfulness refers to an intentional act; a finding of negligence is not sufficient. 31 Bankr. Rptr. at 339. With respect to the interpretation of malicious, the court stated:

> Acts have been held to be 'malicious' pursuant to Bankruptcy Code Section 523(a)(6) if they are wrongful and without just cause or excessive, *In re La Brant*, or wrongful acts done without just cause or excuse, *In re Askew*, 22 B.R. 641 (M.D. Ga. 1982), *Matter of Grace*, 22 B.R. 653 (E.D. Wis. 1982). The case of *In re Donny*, 19 B.R. 354 (W.D. Wis. 1982) held that an injury is willful and malicious if the debtor knew that an injury would be caused and proceeded in the face of this knowledge to carry out the actions which would cause injury. Personal hatred and ill will are not elements of malice pursuant to Bankruptcy Code Section 523(a)(6). *Matter of Chambers*.

Id.

The plaintiff relies on *First National Bank of Albuquerque v. Franklin (In re Franklin)*, 726 F.2d 606 (10th Cir. 1984). Although *Franklin* also arises in a medical malpractice context, it is distinguishable from the present proceeding.

The debtor in *Franklin* was a surgeon who was held responsible for anesthesia given to a minor during an appendectomy. The

plaintiff bank was the guardian of the minor's estate. The debtor failed to obtain any medical history prior to surgery and over-anesthetized the patient. The boy suffered cardiac arrest during surgery and was severely brain damaged as a result. A default judgment awarding compensatory damages was entered in state court; a trial was held on the issue of punitive damages. Those damages were also awarded and affirmed on appeal.

The primary issue presented in *Franklin* involved the deference to be paid to state court findings in bankruptcy proceedings, *i.e.*, whether a state court judgment has res judicata or collateral estoppel effect. The discussion of willful and malicious conduct under §17a(8) of the Act has very little applicability here because of substantive changes reflected in the legislative history to §523(a)(6) of the Code; those changes will be discussed below.

The facts in *Franklin* presented extraordinary circumstances. Not only was the malpractice blatant and the injuries catastrophic, but the record revealed that the doctor had intentionally destroyed records to cover up his errors. Those extremes, in combination with the looser standard for nondischargeability under the Act, resulted in the appellate court's affirmation of the bankruptcy court's finding of nondischargeability.

The legislative history to §523(a)(6) of the Bankruptcy Code reveals a clear congressional rejection of the case law under the Act which grounded a finding of willful and malicious conduct upon negligence. As summarized in Colliers:

> An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hatred, spite or ill-will. The word "willful" means "deliberate or intentional", a deliberate and intentional act which necessarily leads to injury . . . .
>
> A claim or judgment based merely upon negligence does not necessarily constitute a willful and malicious

> injury within the exception even if the negligence is alleged to be reckless and wanton ... Cases decided under section 17a(2) of the Bankruptcy Act, such as *Tinker v. Colwell* [193 U.S. 473 (1904)] holding that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

3 Collier on Bankruptcy ¶523.16 at 523-118 — 523-122 (15th ed. 1979) (footnotes omitted). Congress intended to eliminate injuries caused by negligence from those debts deemed nondischargeable — even when the act of negligence is so reckless and wanton as to be characterized as gross negligence.

The record in this proceeding supports the finding that the debtor caused the infection by injecting an unsterile needle into the deep tissue of Mrs. Perkings' foot and that his treatment of that infection did not meet the appropriate standard of care. He failed to test the infected area in a timely manner; he failed to prescribe the drugs of choice required by the laboratory analysis; and he failed to hospitalize the plaintiff when further laboratory analysis showed that only hospital-strength antibiotics administered intravenously could combat the virulent infections. This Court, therefore, finds that the plaintiffs' injuries were caused by the debtor and that, under the tort law of this state, they are entitled to damages. No evidence was, however, admitted to support the finding that the debtor intended to harm Mrs. Perkins. Proof that the debtor injected an unsterile syringe and prescribed ineffective medications is not proof of willful and malicious injury. It is not the intent to inject the syringe or prescribe the medications that satisfies the statute; it is the intent to cause harm that has to be proven. Although this Court may regard the debtor's treatment of this plaintiff to be absolutely appalling, that conduct did not rise to the level of an intentional tort contemplated in §523(a)(6).

The Bankruptcy Code makes no special provision for the nondischargeability for damages caused by negligence. That policy may be ill-advised, but it is the law as it presently stands. *See Foell v. Hungate* (*In re Hungate*), 2 Bankr. Ct. Dec. 1046 (Bankr. E.D. Mich. 1976). The consent judgment entered into between these plaintiffs and the debtor is determined to be dischargeable.

IT IS SO ORDERED.

STANLEY B. BERNSTEIN
U. S. Bankruptcy Judge

Dated: August 2, 1984

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

THOMAS L. SCHARFFE, D.P.M.,
Debtor.

BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs,

vs.

T. L. SCHARFFE, D.P.M.,
Defendant.

Case No. 84-01779-BE

A.P. No. 84-0363-BE
Honorable Stanley B. Bernstein

NOTICE OF APPEAL

Betty L. Perkins and Harry A. Perkins, Plaintiffs, appeal to the District Court from the Final Order of Bankruptcy Court dated August 2, 1984, and entered in this adversary proceeding on the 3rd day of August, 1984. The parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

Dr. Thomas L. Scharffe, D.P.M., Defendant
Attorney John J. Hebert (P14806)
309 Davidson Building
P.O. Box 835
Bay City, Michigan 48707
(517) 893-3518

Memorandum, Opinion, and
Order of Bankruptcy Court

BRAUN, KENDRICK, FINKBEINER,
SCHAFER & MURPHY
BY: (s) Frank M. Quinn (P19155)
Attorneys for Plaintiffs
201 Phoenix Building
Bay City, Michigan 48706
(517) 895-8505

Dated: August 10, 1984

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

THOMAS L. SCHARFFE, DPM
Debtor,
BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs — Appellants,

CASE NO. 84-3816

-v-

THOMAS L. SCHARFFE,
Defendants — Appellee

COURT'S OPINION

PROCEEDINGS had and (excerpt) of the above-entitled matter before the Honorable Horace C. Gilmore, a U.S. District Judge, held Thursday, 8/25/85, Federal Building, 8th Floor; Detroit, Michigan 48226.

Appearances:

MARK SMITH, *Attorney at Law*
P.O. Box 835
Bay City, Michigan 48707
On behalf Defendant — Appellee

Frank M. Quinn, *Attorney at Law*
201 Phoenix Building
Bay City, Michigan 48706
On behalf of Plaintiff — Appellant

Memorandum, Opinion, and
Order of Bankruptcy Court

Detroit, Michigan
Thursday, August 25, 1985
Afternoon Session

JUDGE'S OPINION

THE COURT: Thank you both very much. This case is an appeal from the Bankruptcy Court proceeding involving a Dr. Scharffe, a pediatrist, appellants, and the Bankruptcy Court had held the debt to be dischargeable that arose out of an alleged medical malpractice were pretty bad, at least, the bankruptcy. It was absolutely appalling. The appellants are the creditors. A suit was filed in Wayne County Circuit Court alleging malpractice and was filed in Bankruptcy shortly after the case was scheduled to go to trail. After the automatic stay was lifted, the parties settled the case for a hundred and eighty thousand ($180,000) and now, there's a dischargeability of the judgment of bankruptcy after a hearing that the debt was dischargeable.

Now, there's a claim in the appeal that are on basically two grounds: First, in the standard, the debt is willful and malicious injury was improperly applied by the Bankruptcy Court and that certain evidence relating to the application of prior treatment of other patients in a similar way and similar results were excluded improperly. Now, 11 USC with reference to the first issue, whether the debt was properly discharged by Judge Bernstein, — 11 USC 526, exception to discharge and bankruptcy and it states specifically, a discharge does not discharge a individual debtor from any intent for willful and malicious injuries from a debt to the property of another entity and the bankruptcy judgment is that it is not the intent to inject a severing* that satisfies the statute and held that it was the intent to cause harm that has to be proven and held — he held that the actions even though it was grievious and and did not amount to a willful and malicious

injury, the appellant relies on Tinker versus Caldwell; but 193 US 473, a 1904 case, U.S. Supreme Court case, which applies reckless disregard standards negligent judjment in discharge bankruptcy debts.

However, I think it is clear in my mind, at least, that the Tinker case has been expressly overruled to the inactionment of 11 USC 526, the only authority is a 9th Circuit case that we have found is 1637 Reporter 671, 1984 case where that circuit's bankruptcy was appealed — held that the construction of the statute which allowed for a non-dischargeability of less dischargeability as expressly inactionment of 11 USC. So I doubt there is merit on this point and I will therefore affirm the bankruptcy on the standards used to determine malicious and willful with reference to the second issue, it's been conceded by the — If I adopt such a standard that, really, it would be similar acts would be irrelevant but I want to comment on it, anyway. The bankruptcy judge excluded evidence establishing sought to be offered which would show that five individuals had been harmed by this person and the four of them had filed civil actions which were later settled and dismissed. Now, I think in that case that even though it was error that excludes them, it was harmless error and there was the question as to whether it was admissible under 404 B. And, finally, I think probably the most — other than the one I think was erred in Congress as one is probative value outweighed by its prejudicial effect, Federal Rules of Evidence 403. For those reasons, I will affirm the determination of the Bankruptcy Court.

(Proceedings concluded.)

* * *

Memorandum, Opinion, and
Order of Bankruptcy Court

CERTIFICATE OF COURT REPORTER:

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS
CITY OF DETROIT)

I, BERNEDA G. WILKINS, CSR 2240, reported the proceedings taken in the matter of Thomas L. Scharffe, DPM; Case No. 84-3816, before Honorable Horace C. Gilmore, a U.S. District Judge, Federal Court; held Thursday, 8/25/85; that the same was reduced to typewritten form under my supervision, and that the attached 5 pages constitute a full, true and accurate transcript of my stenotype notes.

(s) Berneda G. Wilkins
Court Reporter

Dated: Friday, October 11, 1985

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTY L. PERKINS
Plaintiff,

vs.

T. L. SCHARFFE
Defendant

CIVIL ACTION NO. 84-3816
BANKRUPTCY # 83-00204
ADVERSARY # 83-0283

ORDER AFFIRMING BANKRUPTCY COURT

At a session of said Court held in the United States Federal Courthouse, Detroit, Michigan, on May 31, 1985.

PRESENT: HONORABLE HORACE W. GILMORE
U.S. FEDERAL DISTRICT JUDGE

This matter being before this Court on appeal from the United States Bankruptcy Court of this district; briefs having been submitted and arguments of counsel being heard; IT IS ORDERED THAT the action of the Bankruptcy Court be affirmed.

(s) Horace W. Gilmore
United States District Judge

Memorandum, Opinion, and
Order of Bankruptcy Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:
THOMAS L. SCHARFFE, D.P.M.,
Debtor.
BETTY L. PERKINS and
HARRY A. PERKINS,
Plaintiffs-Appellants,

vs.

T. L. SCHARFFE,
Defendant-Appellee.

Bankruptcy Case
No. 84-01779-BE

Civil Action No. 84-381
Judge Gilmore
Bankruptcy Adversary Proceeding
No. 83-0283

United States Court of Appeals
for the Sixth Circuit
No. _____

NOTICE OF APPEAL

Notice is hereby given that creditors, Betty L. and Harry A. Perkins, do hereby appeal to the United States Court of Appeals for the Sixth Circuit from the order of the above-named District Court entered on May 31, 1985, granting to the above-named debtor, T. L. Scharffe, D.P.M., a discharge from the claim of Betty L. and Harry A. Perkins, and affirming the order of the Bankruptcy Court entered by the honorable Stanley B. Bernstein, Bankruptcy Judge for the Eastern District of Michigan. The Party to the Order appealed from and the name and address of his attorney are: Dr. T. L. Scharffe, D.P.M., Defendant-Appellee,

Attorney John J. Hebert, 309 Davidson Building, P.O. Box 835, Bay City, Michigan, 48707.

BRAUN, KENDRICK, FINKBEINER,
SCHAFER & MURPHY
Attorneys for Plaintiffs-Appellants

Dated: June 27, 1985

(s) Frank M. Quinn
FRANK M. QUINN (P19155)

and

(s) Daniel S. Opperman
DANIEL S. OPPERMAN (P33159)
201 Phoenix Building
Bay City, Michigan 48708